(1) Supreme Court, U.S.
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No. 03-1065

In The

Supreme Court of the United States

ROSEMARY C. STEINBRECHER,

Petitioner,

vs.

JOHN STEINBRECHER,

Respondent.

On Petition For A Writ Of Certiorari To The Third District Court Of Appeals At Austin, Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Amendment XIV of the U.S. Constitution guarantees to all persons the equal protection of the law.

Is it a violation of the Fourteenth Amendment to hold different litigants in the same case to separate standards of law, or to selectively apply standards to different litigants in the same case?

LIST OF PARTIES

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Rehearing Denied July 11, 2003 (Postcard notification misplaced by appellant; the Court does not keep copies of postcards.)

Texas Supreme Court denial of review, October 24, 2003. Their case no. 03-0791 is found at App. 67.

Illinois Supreme Court decision in *Steinbrecher v. Steinbrecher*, 197 Ill.2d 514, 259 Ill. Dec. 729, 759 N.E.2d 509 (Ill. 2001), is found at App. 7.

STATEMENT OF JURISDICTION

(i) The date the judgment sought to be reviewed was entered on June 5, 2003 in the Third District Court of Appeals at Austin, Texas.

(ii) Rehearing was denied by that Court on July 11, 2003.

(iii) The State Supreme Court of Texas denied review of the case on October 24, 2003.

(iv) The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. § 1257(a)?

1. The U.S. Constitutional provision of the Fourteenth Amendment's protection against seizure and sale of property without "due process of law" was raised before Judge John Dietz, 250th Judicial District, Travis County,

Texas at hearing on April 3, 2002. The "separate standard for law" question was not raised directly before him, although the question is related to lack of due process. (Court conversing with defendant regarding the then still pending Illinois case also cited in this Petition and its relation to the Texas case. (pp. 23-25 of transcript of April 3, 2002 before Judge John Dietz, 250th Judicial District, Travis County, Texas.)

2. After the June 5, 2003 Memorandum Opinion of the Third Court of Appeals at Austin, Texas was issued, appellant filed a timely motion for rehearing. In that motion, she raised at some length the exact question of this current Petition; that the court was holding a separate standard of law for different litigants in the same case, and that this violated the Fourteenth Amendment of the U.S. Constitution's provision requiring the States to afford "equal protection" of the law. (In its "Memorandum Opinion," the court had failed to acknowledge appellant's primary arguments of the jurisdiction of the Illinois probate order over a Texas court, and that title issues had not been resolved at hearing, pursuant to Texas law.) Motion for rehearing was denied without comment.

3. Appellant also raised the same question as in par. 2, above, in her petition for review to the Texas Supreme Court, which was denied.

4. Appellant also raised the question of a separate standard of law for different litigants in the same case, in her motion for rehearing in the *Steinbrecher v. Steinbrecher* Illinois Supreme Court case in 2002, which was denied.

5. Appellant raised the question of lack of due process in the trial court in Illinois in the Kendall County case 95 CH 60. Violations of the Fourteenth Amendment were specifically argued by her attorney in that case. Although the Second District opinion was in appellant's favor and vacated the sale of property, that Court did not comment directly on the U.S. Constitutional issues.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV; Section 1, of the U.S. Constitution. "No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Illinois Supreme Court Rule 304(a)

Rule 304. Appeals from Final Judgments That Do Not Dispose of an Entire Proceeding

(a) Judgments As To Fewer Than All Parties or Claims – Necessity for Special Finding. If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both. Such a finding may be made at the time of the entry of the judgment or thereafter on the court's own motion or on motion of any party. The time for filing a notice of appeal shall be as provided in

> Rule 303. In computing the time provided in Rule 303 for filing the notice of appeal, the entry of the required finding shall be treated as the date of the entry of final judgment. In the absence of such a finding, any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties.

ADDITIONAL STATUTES AND RULES REPRODUCED IN THE APPENDIX:

	Title of Rule or Statute	App. Page
1.	Texas Rules of Civil Procedure; Section 4. Partition of Real Estate	68
2.	Texas Property Code; Chapter 23. Partition	78
3.	Illinois Code of Civil Procedure 735 ILCS 5/17-101, et seq. "The Partition Act"	80
4.	Illinois Supreme Court Rule 303. Appeals From Final Judgments of the Circuit Court in Civil Cases	94
5.	Illinois Supreme Court Rule 305. Stay of Judgments Pending Appeal	97

STATEMENT OF THE CASE

Two cases are examined in depth in this petition. They are from two states. Texas and Illinois. They are traced through one or more courts of review in their respective states.

Both states have precedents which state basically the same thing; pro se litigants must be held to the same standards of law as persons with professional representation. What seems to be the pattern, however, is that the "pro se" litigants are held to very exacting standards of law to which the other litigants are not held. Appellant believes this pattern of selective application, or misapplication violates the U.S. Constitution's Fourteenth Amendment guaranteeing "equal protection" of the law to all persons.

ARGUMENT

The subject of this appeal is whether pro se litigants are being denied equal access to, and equal protection of, the courts in at least two states through an examination of two different cases, including the instant case which has brought this issue under the jurisdiction of this Court.

The instant case is a Texas case, reviewed by the Third District Court of Appeals (cited at App. 1-6). The other case examined is an Illinois case, reviewed by that Supreme Court in 2001 (App. 7-55). Both decisions cite precedent roughly saying the same thing, that pro se litigants must be held to the same standards of law as the other litigants represented by counsel. But "same" needs to mean same in the entire picture. What it seems to mean in the two cases cited, and reasonably by extension to other similar situations, is that error of any type by the pro se is fatal, irrespective of error by any other participant in the action, including the court. In other words, what this court is being asked to consider is whether standards of law are being selectively applied.

If this were true of just one case, even in the several courts, in just one state, this might be called (although not necessarily), "misapplication of a properly stated rule of law." (For which U.S. Supreme Court Rule 10 states petition for writ is rarely granted.) But when a serious pattern emerges in two separate states, also at various court levels, it seems definitely to come under the scope of violations of the U.S. Constitutional guarantee of equal access to the courts and equal protection of the law. (Cited in Section 1(f) of petition.)

Although the Texas case is the instant case, to establish a pattern, appellant will first deal with the prior Illinois case. *Steinbrecher v. Steinbrecher*, 750 N.E.2d 509 (Ill. 2001) (App. 7-55). The purpose of the references to that case is simply to show that holding a pro se litigant to standards of law seems fair and just. But holding a pro se litigant to absolute and exacting standards when no one in the case, including the trial court and even the State Supreme Court, was held to precise standards, seems like violations of the U.S. Constitution guaranteeing equal access to and equal protection by the courts.

Briefly, the case involved a partition action filed by (same plaintiff) John in November, 1995, on 410 acres in Kendall County, Illinois. (The Illinois Partition Act, 735 ILCS 5/17-101, *et seq.*, is reproduced at App. 77-90.) As stated by the dissent (begins at App. 27) in the Illinois Supreme Court opinion, the proceeding was not according to applicable law. Although defendant (appellant) contested the gross irregularities of the case, the property was "sold" to a Moser Enterprises, Inc., on September 24, 1998.

Rosemary filed a pro se appeal, and her mother provided funding for an attorney to continue. The Second

District Appellate Court of Illinois, in January, 2000, (312 Ill.App.3rd 289, 244 Ill.Dec.807, 726 N.E.2d 1118) vacated the sale. Moser Enterprises appealed to the Illinois Supreme Court, and a total of five appellate attorneys were amassed against Rosemary, whose mother had run out of funding.

The dissent is seventeen pages in the Illinois Supreme Court decision and deals with the virtually complete lack of a statutory proceeding. Justice Freeman goes through the litany of illegal and non-statutory proceedings, and alludes to fraud (App. 47ff), or the suspicion thereof.

In the following point, however, the Supreme Court majority was willing to temporarily re-write the law and then mis-apply that law. The point is given simply to show that, for the non-pro se litigants, no reach was too far.

The dissent stated (correctly) (App. 33ff, and App. 48) that the statutory requirement (Section 105, "Judgment" App. 79) had not been fulfilled by the October, 1997 order emanating from the August 11 and 12, 1997 hearing on the Appraiser/Commissioner's report, and that there was no order in the case prior to sale which fulfilled the requirements of a final order (Illinois Supreme Court Rule 304(a) (Stated in this Petition, Sec. 1(f)). Therefore, the sale was void, and Ill. Supreme Court Rule 305(j) (App. 96), which protects the right, title and interest of non-party buyers acquired after the judgment becomes final, could not apply.

However, the majority stated that (App. 17), even though this October, 1997 order did not apply, there was another order in the case which did fulfill the Rule 304(a) requirements for a final order. It was the September 24, 1998 order confirming the sale of the subject property. It

did, indeed, have most of the requirements of the final order in Illinois; all the active parties rights were listed. It also included specific "Rule 304(a)" language declaring it to be a final and appealable order. Therefore, so the majority stated, that objection has been covered, and the four member majority approved the sale.

Specifically, the majority much emphasized that Ill. Supreme Court Rule 305(j) (App. 96) states that:

> "If a stay is not perfected within the time for filing the notice of appeal, or within any extension of time granted by subparagraph (c) of this rule, the reversal or modification of the judgment does not affect the right, title, or interest of any party who is not a party to the action in or to any real or personal property that is acquired *after* (emphasis added) the judgment becomes final and before the judgment is stayed . . . "

In a statutory proceeding, a Section 105 "judgment order" chronologically comes months, even years before a partition sale, (Section 116ff, App. 84ff.) The judgment order is supposed to be given to the statutory Commissioner, (Sections 106-108) who then attempts to make division using the powers statutorily described, including owelty described in the judgment order, to make division in kind.

The point is, by switching the whole thing around and making the order of sale the exact same order as the "judgment order" in the case there was no chance for a stay to be perfected "after the judgment becomes final" and yet "before" the right, title and interest were acquired by a third party. The order was one and the same. In fact the elements of the Rule 304(a) final order come AFTER the order confirming the sale, in the order on the same date, September 24, 1998.

The point is, there is no possible way anyone could have "perfected" a stay pursuant to Rule 305(j), because the Illinois Supreme Court had simply turned law upside down trying desperately to have a "fig-leaf" cover to grant approval to the class of litigants whose cause they espoused. (App. 22).

Even if all the above could actually be just taken as honest mistakes, etc., the real relevance to this present appeal is in their discussion of Rosemary's pro se status (App. 21). Even if this present Court believes that all mistakes of law by everyone in the case were simply just honest, but human, mistakes, what this appellant is asking from this Court is that the same consideration MUST be given to pro se litigants.

Illinois Sup. Ct. Rule 303(c) (App. 96) allows for an extra 30 days to file notice of appeal at the appellate court's discretion, upon motion. While appellant never filed such a motion because she believed her October 30 motion was sufficient, as discussed in the decision at App. 10-11, et al., it is not outside the scope of Illinois law for extra time to be granted.

But, for purposes of this present appeal, this appellant is simply stating that it is against the U.S. Constitution for a court to cite law to defeat an unrepresented ("pro se") litigant, and allow, encourage, and even engender violations of law by everyone else involved in the case. Citing such law that pro se litigants must be held to the same standards of law as everyone else can only be acceptable if everyone else in the action is, in fact held to the same *standards* of law.

THE TEXAS CASE

As stated in the introduction, this case was also a partition action. There were only the three siblings as parties; plaintiff John, and defendants Jerome and Rosemary. The citation (App. 101) allows 20 days to answer. Defendants Jerome and Rosemary failed to timely answer. An interlocutory default judgment (App. 64) ordering sale of property and that a receiver be appointed was obtained by John on January 8, 2002. The trial court denied Rosemary's motion to vacate the default and allow her answer and appointed a receiver to sell the property (App. 56-59). Rehearing was overruled and Rosemary appealed.

In Rosemary's appeal (excerpts of her brief at App. 110ff) Rosemary brought out what she believed were the insufficiencies of the complaint to proceed directly to a default judgment ordering sale of the property. Rosemary gave a definition of "jurisdiction" from a standard legal compendium (*Black's Law Dictionary*, Seventh) as including "power to act." Rosemary particularly dwelt on the coincidence of place aspect of jurisdiction as not being the only criterion for this "power to act."

Rosemary stated that no allegations of title were alleged by plaintiff in the original petition (App. 104ff), and therefore never confirmed by default. She further stated in her "Statement of Facts" (App. 111) that the parties' deceased father never owned the property free of title encumbrances.

Filed with the original petition was a 1991 Illinois "Order of Heirship" from a Cook County Probate Court (App. 108) and a single piece of paper headed "Schedule A – continued," (App. 109) with an abbreviated legal description and the words at the top; "3. (sic) Record title to the

land on the effective date appears to be vested in Francis J. Steinbrecher, Sr." Also attached to the complaint was a detailed legal description.

In her brief, Rosemary stated her belief that, while the 1991 Cook County, Illinois Probate Court "Order of Heirship" would be of importance at the hearing or "trial" in the case, there was nothing in the file, or ever presented to the court, as to what relevance that Illinois probate order has to a Texas court action. Further, the single sheet "Schedule A," with no other identification, does not identify the "effective date," nor is there any explanation as to why "appears to be" is used instead of "is" for record title in the name of the parties' deceased parent.

Rosemary stated in her brief (App. 113) that the "appears to be" should have been dealt with by the court, or an explanation somewhere in the file, why that statement is only "appears to be" and is not "is" in the name of the deceased father.

Rosemary argued, and cited support for that argument (App. 112), that a case cannot proceed to judgment, and particularly to judgment involving sale of property to a potential third party, without being "ripe for judgment," and that this case did not meet that criteria for the above reasons.

Further, Rosemary argued that the case cited by the trial court in denying Rosemary's motion to vacate default (*Craddock v. Sunshine Bus Lines*), *Inc.*, 133 S.W. 2d, 124 (Tex. 1039)) had nothing to do with jurisdictional issues. (App. 115)

In the Third District Appellate Court's Memorandum Opinion (App. 1-6) the court states on p. 1, in footnote 1,

Litigants choosing to act pro se must comply with the applicable procedural rules and are held to the same standards that apply to licensed attorneys," citing authority.

However, the court then goes on to ignore the question of appellant as to the relevance of the Illinois Probate Court order in the Texas court. The court (App. 2) does list the documents that accompanied the petition and describes them, period. This seems not to have struck the court as needing comment, but the court never even says that much. It simply writes of them as though they had full authority, but the court never says why.

However, Rosemary's brief raises the issues at some length. The Illinois "Order of Heirship" may have some direct absolute validity in a Texas court, unsupported by any other evidence or citation of authority, but appellant simply asked the court to please address the issue. It never did.

The court does not seem even to give a nod of the head to Rosemary's primary arguments. The court definitely mentions the word "jurisdiction," but seems to equate it solely with co-incidence of place (App. 4). There seems to be no comment on Rosemary's argument of further requirements for valid "power to act."

The court definitely does mention the 1991 Cook County, Illinois Probate Court "Order of Heirship," but holds it up as valid and binding in the Texas court with no citation of any kind as to why this is so. Nor does the court offer its opinion as to why this is so, which might set precedent and end the controversy.

The same for Rosemary's argument as to the title issues not being resolved prior to order of sale. Tex. R. of Civ. Proc. 760 (App. 71) does allow courts to resolve title issues "upon the hearing of the cause." However, Rosemary's whole point is that none of this was done at hearing, and that a new trial should be, or have been granted, to fulfill these deficiencies.

Tex. R. of Civ. Proc. 760 states that, "Upon the hearing of the cause, the court shall determine . . . all questions of law or equity affecting the title to such land which may arise." Rosemary argued in her brief (App. 115), citing from the trial court record that the receiver's intention was to "first find a buyer" and then bring questions of title to the court for resolution. Rosemary argues that this was not consistent with the law or prudence, and that irregularities and lacks in the file may reasonably lead to some buyers choosing not to bid on the subject property (i.e., "chilled and stifled bidding") The appellate court completely ignores this argument in the brief, but instead hearkens back to an argument made by Rosemary three months before the receiver made his statement. The comment by the receiver seemed by Rosemary extremely significant. The appellate court completely ignored it and picked out something else from the trial record to comment upon.

Thus, the "Memorandum Opinion" never resolves the issue of the irregularity, at best, of bringing title issues to a court *after* a buyer is found. It ignored Rosemary's "Statement of Fact" in her brief (App. 111) which was never refuted by plaintiff, that the subject property was never owned free of title encumbrances by our deceased father, that appellant was not prepared to state that there were no title issues, and certainly plaintiff never had.

There never was a Texas probate, and the Illinois probate absolutely did not assume any jurisdiction over any out-of-state properties.

The court's statement, with citations, that the pro se litigants are to be held to the same standards as the professionals simply has to be further defined by some source i.e., this Court, to which lower courts will listen. The court's use of the word "choosing" to act pro se really does not jibe with the court's comment in footnote on App. 4. Plaintiff John had filed multiple (3) partition actions in two states, and defendants were faced with going pro se or not doing anything.

There is no argument that pro se litigants will and do make mistakes. That is why one retains a professional in any field. What is being asked of this Court is to weigh in with what might seem so obvious as to be unnecessary, that all litigants have to be held to the same standards of law. But what is in fact arguably the practice is that, if there is a pro se litigant, some fault is found and that ends the case, no further argument or examination is required or takes place.

In the instant case, Rosemary argued that the *Craddock* case criteria had nothing to do with jurisdictional issues. But since the court seemed to take no cognizance of Rosemary's arguments, the point may have seemed to have been answered with what the opinion does say.

Even though this brief has its faults, appellant asks this Court to consider her petition.

CONCLUSION

Wherefore, for the reasons as stated above, petitioner respectfully requests that this Court grant her Petition for Writ of Certiorari to the Third District Court of Appeals at Austin, Texas, to decide this issue of federal law.

Respectfully submitted,

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Illinois Supreme Court Rules ..... App. 94

Citation, State of Texas App.101

Plaintiff's Original Petition ..... App. 104

Exhibit A, Order Declaring Heirship ..... App. 108

Exhibit B, Schedule A App.109

Appellant's Brief, excerpted ..... App. 110

**TEXAS COURT OF APPEALS,
THIRD DISTRICT, AT AUSTIN**

NO. 03-02-00681-CV

Rosemary C. Steinbrecher, Appellant

v.

John Steinbrecher, Appellee

**FROM THE DISTRICT COURT OF
TRAVIS COUNTY, 200TH JUDICIAL
DISTRICT NO. GN101701, HONORABLE
DARLENE BYRNE, JUDGE PRESIDING**

MEMORANDUM OPINION

This is an appeal from a default judgment entered against Rosemary Steinbrecher ("appellant") and Jerome Steinbrecher. In four issues, Rosemary Steinbrecher appeals *pro se*,[1] challenging the jurisdiction of the district court to render its decision and contending that the

[1] Litigants choosing to act *pro se* must comply with the applicable procedural rules and are held to the same standards that apply to licensed attorneys. *See In re Estate of Dilasky,* 972 S.W.2d 763, 766 (Tex. App. – Corpus Christi 1998, no pet.); *Greenstreet v. Heiskell,* 940 S.W.2d 831, 834-35 (Tex. App. – Amarillo 1997, no writ). To treat the *pro se* litigant differently would accord an unfair advantage over litigants represented by counsel. *See Mansfield State Bank v. Cohn,* 573 S.W.2d 181, 184-85 (Tex. 1978).

evidence is legally and factually insufficient to support its order. We affirm.

Appellee John Steinbrecher brought an action pursuant to section 23.001 of the property code, *see* Tex. Prop. Code Ann. § 23.001 (West 2000), seeking the partition by sale of a 13.885-acre tract of land in Travis County, which he owns as a tenant in common with his siblings, Rosemary and Jerome. The petition alleged that John, Rosemary, and Jerome are brothers and sister and the sole heirs of their father, Francis J. Steinbrecher. John attached to the petition: (i) a copy of an order declaring heirship that was entered in the Circuit Court of Cook County, Illinois, County Department, Probate Division, on March 6, 1991; and (ii) documents containing the legal description of the land. At the time of his death, Francis Steinbrecher owned the unimproved tract of land. As his sole heirs, the three parties to this lawsuit each own a one-third undivided interest in the land. Because the property has little road frontage and is narrow and deep, the petition alleged that a fair and equitable division of the property could not be made and that the property is incapable of partition in kind.

Neither Rosemary nor Jerome filed an answer or appeared. The district court rendered an interlocutory default judgment on January 8, 2002, finding that the property was incapable of partition in kind and that a fair and equitable division of the property in kind could not be made, and that John was entitled to have the property partitioned by sale. The court determined that a receiver should be appointed to sell the property.

On February 11, 2002, appellant filed a Motion to Vacate Interlocutory Default; Allow Answer, Counterclaim

and Cross Claim, and Accept Evidence of Divisibility or Partition in Kind. At a hearing on the motion on April 3, appellant failed to adduce any evidence to demonstrate her entitlement to a new trial. *See Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939). Following a motion to reconsider that was denied, a receiver was appointed to sell the property. An interlocutory order appointing a receiver is appealable. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(1) (West 1997). Appellant filed this appeal.

DISCUSSION

By her first two issues, appellant challenges the jurisdiction of the court to render the default judgment. She first challenges the court's authority to assume jurisdiction when, if she had filed an answer, "jurisdiction would not be clear or gained at all." She then challenges the court's exercise of jurisdiction because the record does not establish that the court had jurisdiction "and that the case is ripe for judgment." Without presenting evidence or otherwise complying with the *Craddock* factors for a new trial,[2] appellant urged before the district court and now on

[2] After suffering a default judgment for failing to answer or to appear, the defendant may move for a new trial on the equitable grounds of excusable mistake or accident. The court will vacate the judgment if the defendant makes the three-part evidentiary showing prescribed by *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (Tex. 1939). To satisfy the *Craddock* test, the defendant must show that: defendant's failure to answer or appear was not intentional or due to conscious indifference, but rather was due to a mistake or accident; defendant has a meritorious defense; and granting the new trial will not occasion a delay or otherwise operate as an injury to plaintiff. *Id.* at 126; *see also Bank One, Tex., N.A. v. Moody*, 830 S.W.2d 81 (Tex. 1992).

(Continued on following page)

appeal that John failed at the default judgment hearing to present proof of ownership of the property, or that her father owned clear title to the property.

Default judgments are based on the plaintiff's pleadings. A default judgment on an unliquidated claim admits all allegations of facts set out in the petition, except the amount of damages. *Stoner v. Thompson,* 578 S.W.2d 679, 684 (Tex. 1979); *Jackson v. Biotectronics, Inc.,* 937 S.W.2d 38, 41 (Tex. App. – Houston [14th Dist.] 1996, no writ) (op. on reh'g). If the facts set out in the petition allege a cause of action, a default judgment conclusively establishes the defendant's liability. *Morgan v. Compugraphic Corp.,* 675 S.W.2d 729, 731 (Tex. 1984). The petition must attempt to state a cause of action, give fair notice of the claim, and not affirmatively disclose facts that defeat relief. *Paramount Pipe & Supply Co. v. Muhr,* 749 S.W.2d 491, 494 (Tex. 1988). Having reviewed the original petition, we find that it properly alleges an action to partition the property by sale in the district court of the county in which the property is located and that jurisdiction is proper. *See* Tex. Prop. Code Ann. § 23.002 (West 2000).

By defaulting, appellant admitted all of the allegations in the petition, including:

- that the parties to the case own the property as sufficiently described on exhibit attached to petition as tenants in common;

Although appellant argued that she was occupied with other lawsuits between the parties, she failed to make the evidentiary showing required to establish – or raise – the existence of any of the three factors.

- that the parties are brothers and sister and the sole heirs of Francis J. Steinbrecher, deceased, the prior owner of the property, and that a copy of an order determining heirship was attached to the petition;
- that each party owned a one-third undivided interest;
- that John was entitled to have the property partitioned; and
- that the property was not capable of being partitioned in kind.

Because appellant failed to answer and a default judgment was rendered, the allegations of the facts in the petition and liability are deemed admitted. We overrule appellant's first and second issues.

Appellant's third issue is similar to the first and second issues. She complains that, in entering a default judgment, the district court "found" facts without receiving "new evidence." Her complaint seems to be that there was no evidence offered to the district court when the interlocutory default judgment was rendered. This contention is without merit. It is not necessary for the court to hold an evidentiary hearing unless damages are sought. Tex. R. Civ. P. 243. The petition does not seek damages. Thus, the facts as alleged are admitted, further proof is not required at the default judgment hearing, and the judgment is supported by the pleadings and the record.

As her fourth issue, appellant contends that a judicial sale of the property is ill-advised because the bidding at the sale will be "chilled and stifled." She urges here, as she did in the hearing on her motion to vacate before the district court, that the property has greater value as three

parcels than if it is sold as a single parcel: "The fact that the City of Austin requires no subdivision requirements for partition in kind further enhances the value of separate parcels over the whole." She also contends that there is no proof to support the petition's allegation that the property is not capable of being partitioned in kind. But again, this is a challenge to the facts alleged in the petition, which are admitted due to her default. Appellant's fourth issue is overruled.

CONCLUSION

Having concluded that the district court properly exercised its jurisdiction over this action for partition and that appellant failed to make the evidentiary showing required by the *Craddock* decision, we overrule appellant's issues and affirm the judgment.

Jan P. Patterson, Justice

Before Justices Kidd, B. A. Smith and Patterson

Affirmed

Filed: June 5, 2003

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759 N.E.2d 509 (Ill. 2001)

197 Ill.2d 514

259 Ill.Dec. 729

John STEINBRECHER et al., Appellants,

v.

Rosemary STEINBRECHER, Appellee.

Nos. 89551, 89560.

Supreme Court of Illinois.

Sept. 27, 2001.

Rehearing Denied Dec. 3, 2001.

Bruce S. Terlep and Matthew D. Jacobson, of Swanson, Martin & Bell, Wheaton, for appellant John Steinbrecher.

Jerold S. Solovy, Barry Levenstam and Jeffrey T. Shaw, of Jenner & Block, Chicago, for intervenor-appellant Moser Enterprises, Inc.

Rosemary C. Steinbrecher, Chicago, appellee pro se.

Justice FITZGERALD delivered the opinion of the court:

In November 1995, John Steinbrecher (John) filed suit under the Illinois partition act (Act) (735 ILCS 5/17-101 *et seq.* (West 1994)) against his two siblings, Jerome and Rosemary (Rosemary) Steinbrecher, to partition or sell three parcels of land located in Kendall County. At the close of the partition trial, the circuit court held that each sibling held an undivided one-third interest as tenants in

common, but that the property could not be divided "without manifest prejudice." The circuit court ordered public sale of the entire property. Thereafter, the circuit court approved the offer of the highest bidder, Moser Enterprises, Inc. (Moser); confirmed the sale to Moser in open court; and directed that the deed be recorded in Moser's name. Rosemary never perfected a motion to stay judgment and filed her notice of appeal 49 days after the circuit court order. The appellate court determined that Rosemary's procedural errors did not bar her appeal. The appellate court vacated the sale of property to Moser and remanded to the circuit court for further proceedings. 312 Ill.App.3d 289, 244 Ill.Dec. 807, 726 N.E.2d 1118. We now reverse the judgment of the appellate court.

BACKGROUND

On January 21, 1991, Francis Steinbrecher died intestate, survived by his three children, John, Jerome, and Rosemary. As heirs and beneficiaries of the estate of Francis Steinbrecher, John, Jerome, and Rosemary held title as tenants in common to three separate land parcels situated in Kendall County, totaling 409 acres. In November 1995, John filed suit under the Illinois partition act against Jerome and Rosemary in order to partition, or sell in the event partitioning was infeasible, the property.

In August 1996, pursuant to the partition act the trial court appointed a real estate consultant as commissioner to "evaluate the feasibility of partitioning" the property.[1]

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[1] The Illinois partition act provides that the court must appoint three commissioners to assess the feasibility of partitioning the

(Continued on following page)

This commissioner surveyed the property and prepared a written "Appraisal/Commissioner Report" for the court.

At the partition trial in August 1997, consistent with his report, the commissioner testified that the property was incapable of equitable partition-in-kind between the three heirs. He stated that the property consisted of three noncontiguous parcels with widely varied characteristics. For example, the property contained farmland and wooded acreage on a floodplain. Moreover, the location and man-made obstacles such as a railroad track, a county road, and a running creek, further prevented an equal three-way division of the property. Neither Jerome nor Rosemary presented evidence to the trial court to refute the commissioner's testimony.

After reviewing the evidence, the trial court ruled that John, Jerome, and Rosemary each held an undivided one-third interest as tenants in common, that the property could not be divided without manifest prejudice, and that the property should be sold at a public sale.

In 1998, the exclusive listing agent approved by the court listed the property for a price of $4.5 million. In August 1998, after the trial court was notified by the agent of three offers to purchase, the trial court approved the $3.5 million offer of the highest bidder, Moser. In open court on September 24, 1998, the trial court confirmed the sale, directed a quitclaim deed be recorded in Moser's

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property. 735 ILCS 5/17-106 (West 1998). However, the Act allows the court discretion to appoint one commissioner, rather than three. 735 ILCS 5/17-106 (West 1998) ("The court may in its discretion appoint one commissioner who shall have all the rights and powers").

name, and entered a Rule 304(a) finding (155 Ill.2d R. 304(a)) regarding the sale to Moser. Pursuant to the sale, monies were disbursed, including the IRS liens, marketing and advertising fees, the mortgage, closing costs, and attorney fees.

On September 25, 1998, Rosemary filed a *pro se* "Motion for Stay of Judgment Pending Appeal and Rehearing Re: Deposition" which she noticed for hearing on October 2, 1998. On October 2, the trial court continued the motion for hearing to October 30, 1998. The trial court then addressed Rosemary:

> "THE COURT: * * * I told you a long time ago that I'm not going to hear this thing every other day. Just because you want to file a motion doesn't mean I'm going to hear it. I told you to file things once a month. We've set a date for a motion sometime later in this month.
>
> * * *
>
> Now, yet, you continually file motions. You continually get the – the Clerk's office has to bring this file down here. The other attorney has to come in. He was here all morning. And I've told you in the past I'm not going to hear this just because you want to file a motion and notice it up on whatever day you want to notice it up. Now, I will hear the – everything you have, whatever it is, on the next court date
>
> * * *
>
> Now if you do this again, I'm going to start imposing sanctions against you. We're not going to be disrupting everybody's life simply because you want to file a motion, especially when I've given you a date in the future.

ROSEMARY: Your Honor, the date in the future had nothing to do with this particular issue.

THE COURT: What difference does that make? It's [*sic*] court date where everybody is supposed to be here, correct? Do you think I'm going to sit here and have everybody come in here every day just because you want to file a motion and you want to be heard on this day because you happen to be available?

ROSEMARY: I thought time might be of the essence, in fairness to the parties.

THE COURT: I doubt, in this case, time is of the essence to anybody. As I said, do it again and I'm going to start imposing sanctions against you. Okay?"

On October 30, 35 days after the court's final judgment, Rosemary appeared for hearing on her stay of judgment motion. Additionally, Rosemary filed and presented for hearing a new motion, entitled "Motion to Declare Void the Sale of Property to Moser Enterprises, Inc." The trial court denied Rosemary's motion to void the sale and denied Rosemary's motion to stay the judgment. Rosemary never filed a motion with the appellate court to stay the judgment.

Despite the September 24, 1998, order granting right, title, and interest to Moser, Rosemary refused to vacate the Kendall County property. As a result, on October 30, 1998, Moser sought leave to intervene for the limited purpose of "enforc[ing] its right to possession." This was Moser's first appearance in the litigation. The trial court granted Moser's petition for leave to intervene, granted Moser's motion for possession, and ordered Rosemary to vacate the property on or before November 13, 1998.

On November 13, 49 days after Moser was granted exclusive possession of the property, Rosemary filed a notice of appeal. John moved to dismiss the appeal, arguing that the appellate court lacked jurisdiction because the notice of appeal was untimely and because the appeal was moot pursuant to the protections afforded third-party purchasers under Illinois Supreme Court Rule 305(j) (155 Ill.2d R. 305(j)).

The appellate court held that procedural errors did not bar Rosemary's appeal because the threat of sanctions voiced by the trial judge to Rosemary, a *pro se* litigant,[2] "were confusing and likely had the effect of keeping her from filing her motion" within the proper time period. 312 Ill.App.3d 289, 297, 244 Ill.Dec. 807, 726 N.E.2d 1118. By the term "her motion" the appellate court referred to Rosemary's October 30, 1998, "Motion to Declare Void the Sale," which it labeled a post-judgment motion. 312 Ill.App.3d at 297, 244 Ill.Dec. 807, 726 N.E.2d 1118. According to the appellate court, the October 30 post-judgment motion served to toll the period for appeal such that the notice of appeal filed on November 13, 1998, was timely. 312 Ill.App.3d at 297, 244 Ill.Dec. 807, 726 N.E.2d 1118. Additionally, the appellate court held that the issue was not moot because Moser's post-sale, post-judgment intervention on October 30, 1998, barred the application of Rule 305(j) and any protection it afforded nonparty purchasers. 312 Ill.App.3d at 297-98, 244 Ill.Dec. 807, 726 N.E.2d 1118. The appellate court then vacated the sale of

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[2] Rosemary appeared *pro se* in this matter, with two exceptions: she retained counsel to represent her during the partition trial and to represent her during her appeal to the appellate court.

the property and remanded for further proceedings to determine, again, whether the property could be partitioned without manifest prejudice. 312 Ill.App.3d at 305, 244 Ill.Dec. 807, 726 N.E.2d 1118.

Following entry of the appellate court judgment, Moser moved to intervene in order to file a petition for rehearing. On April 19, 2000, the appellate court granted Moser leave to intervene but denied its petition for rehearing. On May 24, 2000, Moser timely filed its petition for leave to appeal to this court. On July 5, 2000, John timely filed his petition for leave to appeal to this court. We granted the petitions and consolidated the appeals.

ANALYSIS

As an initial matter, John and Moser contend that the appellate court committed reversible error because it lacked jurisdiction due to Rosemary's failure to file a timely notice of appeal. Rosemary filed her notice of appeal on November 13, 1998, 49 days after the trial court entered its final judgment. They contend that the notice of appeal was untimely under Rule 303(a), and that her "Motion to Declare Void the Sale" filed on October 30, 1998, did not toll the time to file her notice of appeal because it was also untimely under section 2 1203(a) of the Code of Civil Procedure (155 Ill.2d R. 303(a); 735 ILCS 5/2-1203(a) (West 1998)). Moreover, they contend that even if the motion to void was timely, it did not toll the time to appeal because the motion was an insufficient post-judgment motion under section 2-1203(a). *Andersen v. Resource Economics Corp.*, 133 Ill.2d 342, 140 Ill.Dec. 390, 549 N.E.2d 1262 (1990) (a post-judgment motion must include a request for at least one form of relief specified in

section 2-1203 and allege grounds that warrant the relief); accord *Beck v. Stepp,* 144 Ill.2d 232, 162 Ill.Dec. 10, 579 N.E.2d 824 (1991); but see *Berg v. Allied Security, Inc.,* 297 Ill.App.3d 891, 232 Ill.Dec. 27, 697 N.E.2d 769 (1998) (holding that section 2-1203 does not require specificity despite judicial *dictum* stating to the contrary), *vacated & appeal dismissed,* 193 Ill.2d 186, 249 Ill.Dec. 770, 737 N.E.2d 160 (2000).

It is a well-established proposition that jurisdiction only arises in the appellate court when a party timely files a notice of appeal. *Berg,* 193 Ill.2d at 189, 249 Ill.Dec. 770, 737 N.E.2d 160; *Archer Daniels Midland Co. v. Barth,* 103 Ill.2d 536, 538, 83 Ill.Dec. 332, 470 N.E.2d 290 (1984); 155 Ill.2d R. 301. Under Rule 303(a), entitled "Appeals from Final Judgments of the Circuit Court in Civil Cases," a notice of appeal must be filed within 30 days after entry of a final judgment or within 30 days after the entry of an order disposing of the last pending post-judgment motion. 155 Ill.2d R. 303(a). Section 2-1203(a) of the Code of Civil Procedure addresses the timing of the post-judgment motions referred to in Rule 303(a). According to section 2-1203(a), "[i]n all cases tried without a jury, any party may, within 30 days after the entry of the judgment or within any further time the court may allow within the 30 days or any extensions thereof, file a motion for a rehearing, or a retrial, or modification of the judgment or to vacate the judgment or for other relief." 735 ILCS 5/2-1203(a) (West 1998).

Whether Rosemary's notice of appeal was timely filed is dependent on whether her October 30, 1998, "Motion to Declare Void the Sale to Moser Enterprises, Inc." was a sufficient post-judgment motion under section 2-1203(a) of the Code of Civil Procedure, and whether Rosemary timely

filed that motion. Only a sufficient post-judgment motion, timely filed, will toll the 30-day period for filing a notice of appeal.

In addressing these matters, the appellate court held that Rosemary's October 30 motion was essentially a motion to reconsider, which is a proper post-judgment motion under section 2-1203. As to the timeliness of the October 30 motion, the appellate court held that under the circumstances of this case, the motion was timely and it thus served to toll the 30-day appeal period. The appellate court explained that, although *pro se* litigants are presumed to know the procedural rules, "when, as here, a trial court threatens sanctions for the filing of motions, such a litigant must be given considerable leeway in meeting procedural requirements." 312 Ill.App.3d at 297, 244 Ill.Dec. 807, 726 N.E.2d 1118.

We need not decide whether Rosemary's October 30 motion was a proper motion under section 2-1203 or whether the trial judge's egregious comments excuse Rosemary's failure to file her motion within 30 days of the court's September 24, 1998, final order. Rather, we agree with John and Moser that Rosemary's appeal is moot, pursuant to Supreme Court Rule 305(j), and that jurisdiction is therefore lacking. 155 Ill.2d R. 305(j).

An appeal is moot when it involves no actual controversy or the reviewing court cannot grant the complaining party effectual relief. *Barnard v. Michael,* 392 Ill. 130, 133-34, 63 N.E.2d 858 (1945). Courts of review will generally not consider moot or abstract questions because our jurisdiction is restricted to cases which present an actual controversy. *People ex rel. Sklodowski v. State,* 162 Ill.2d 117, 130-31, 205 Ill.Dec. 63, 642 N.E.2d 1180 (1994);

People ex rel. Partee v. Murphy, 133 Ill.2d 402, 140 Ill.Dec. 873, 550 N.E.2d 998 (1990); *Barnard,* 392 Ill. at 133-34, 63 N.E.2d 858. If this court extends Moser Rule 305(j) protection, the issue is moot and any judgment or reversal by a reviewing court is without effect.

Pursuant to Rule 305(j), John and Moser argue that when the trial court granted right, title, and interest to a nonparty on September 24, 1998, and Rosemary failed to perfect a stay of that judgment, any order invalidating that judgment and sale is without effect. Whether Rule 305(j) renders this matter moot involves the application of law to undisputed facts. Therefore, our review is *de novo. People v. Buss,* 187 Ill.2d 144, 204-05, 240 Ill.Dec. 520, 718 N.E.2d 1 (1999).

Rule 305(j) protects third-party purchasers of property from appellate reversals or modifications of judgments regarding the property, absent a stay of judgment pending the appeal. Rule 305(j) provides:

> "If a stay is not perfected within the time for filing the notice of appeal, or within any extension of time granted under subparagraph (c) of this rule, the reversal or modification of the judgment does not affect the right, title, or interest of any person who is not a party to the action in or to any real or personal property that is acquired after the judgment becomes final and before the judgment is stayed; nor shall the reversal or modification affect any right of any person who is not a party to the action under or by virtue of any certificate of sale issued pursuant to a sale based on the judgment and before the judgment is stayed." 155 Ill.2d R. 305(j).

Thus, Rule 305(j) requires (1) the property passed pursuant to a final judgment; (2) the right, title and interest of

the property passed to a person or entity who is not part of the proceeding; and (3) the litigating party failed to perfect stay of judgment within the time allowed for filing a notice of appeal. 155 Ill.2d R. 305(j).[3]

We now apply those requirements to the instant case. First, on September 24, 1998, the right, title and interest to the Kendall County property passed pursuant to a final judgment. A final judgment disposes of the rights of the parties. *In re Estate of French,* 166 Ill.2d 95, 101, 209 Ill.Dec. 677, 651 N.E.2d 1125 (1995). Particularly, the final

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[3] Section 12-149 of the Code of Civil Procedure is consistent with Rule 305(j). Section 12-149 states:

> "The right, title and interest of any purchaser acquired at a sale made under or pursuant to any judgment in a proceeding in which the court had jurisdiction of the subject matter and of the parties, and who was not a party to such proceeding * * * shall not be affected by any reversal, modification or order setting aside such judgment made in any proceeding to review such judgment, unless at the time of such sale, assignment or pledge, an appeal was pending which operated as a stay of enforcement of the judgment * * * ." 735 ILCS 5/12-149 (West 1998).

Section 12-149 contains only one discernable difference: it requires jurisdiction in the circuit court, an implicit requirement under Rule 305(j).

Rosemary contended during oral argument that the Kendall County court lacked jurisdiction because it rendered "erroneous orders and judgments." Even if Rosemary's contention that the trial court rendered erroneous judgments is correct, a circuit court does not lose jurisdiction because it made a mistake in determining the facts, the law, or both. *In re Marriage of Mitchell,* 181 Ill.2d 169, 174-75, 229 Ill.Dec. 508, 692 N.E.2d 281 (1998). Further, under the Illinois Constitution, circuit courts are courts of general jurisdiction. Ill. Const. 1970, art. VI, § 9. In the instant matter, the proceeding was before the Kendall County circuit court concerning Kendall County property. Thus, the Kendall County court had jurisdiction and authority over the parties and the subject matter.

judgment "decides the controversies between the parties on the merits and fixes their rights, so that, if the judgment is affirmed, nothing remains for the trial court to do but to proceed with its execution." *In re J.N.*, 91 Ill.2d 122, 127, 61 Ill.Dec. 776, 435 N.E.2d 473 (1982); see also Black's Law Dictionary 847 (7th ed. 1999) (a final judgment is a "court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs * * * and enforcement of the judgment"). Where multiple parties are involved in the litigation, a court may enter a final judgment pursuant to Rule 304(a) (155 Ill.2d R. 304(a)). A Rule 304(a) finding renders a judgment final, enforceable, and appealable.

In this case, all issues in controversy concerned the disposition of the Kendall County property. The trial court confirmed the sale of that property, directed a quitclaim deed be recorded, and entered a Rule 304(a) finding regarding the sale on September 24, 1998. Under Rule 304(a), this was a "final judgment" and therefore satisfies the first element of Rule 305(j).

Second, the property passed to a nonparty to the litigation, Moser. A party is defined as "[o]ne by or against whom a lawsuit is brought." Black's Law Dictionary 1144 (7th ed. 1999). This includes a person who has a stake or standing in the lawsuit and one who is entitled to enforce rights from the final outcome of the litigation. *Greer v. Illinois Housing Development Authority,* 122 Ill.2d 462, 492-93, 120 Ill.Dec. 531, 524 N.E.2d 561 (1988).

Under Rule 305(j) a person or entity is deemed a nonparty *at the time* of the judgment and sale. Its language compels this conclusion. Specifically, in regard to minors or persons with disabilities, the text provides that

"[t]his paragraph applies even if the appellant is a minor or a person under legal disability or under duress at the time the judgment becomes final." 155 Ill.2d R. 305(j). Thus, the rule clearly evaluates and assigns status at the time of the judgment and sale.

John initiated his partition claim in November 1995. On September 24, 1998, the trial court approved the offer, ordered the quitclaim deed entered in Moser's name, and entered a Rule 304(a) finding. When Moser acquired title pursuant to the judgment and sale, and at all times prior, neither was it "[o]ne by or against whom a lawsuit is brought" nor did it have a stake or standing in the partition lawsuit. Moser was a mere purchaser of the property. At the time of the judgment and sale, therefore, Moser was a nonparty for purposes of Rule 305(j).

Consistent with the appellate court's opinion, Rosemary contends that when Moser intervened in the circuit court on October 30, 1998, to secure its right to possession it became a "party" to the litigation and lost the protections afforded to nonparty purchasers under Rule 305(j). We reject this argument and hold that post-sale, post-judgment intervention does not bar the application of Rule 305(j). As discussed, status attaches at the time of the sale and judgment. Stripping the protection of Rule 305(j) because of subsequent efforts by a party to secure exclusive possession of the property would render an absurd result. *State Farm Fire & Casualty Co. v. Yapejian,* 152 Ill.2d 533, 541, 178 Ill.Dec. 745, 605 N.E.2d 539 (1992) (whenever possible, this court shall avoid interpretations that render absurd or unjust results). Such a holding would deny recourse to parties who in good faith purchase property pursuant to a judicial sale, but are unable to secure right to possession and use of that property. This

outcome would force parties to choose court intervention, and lose the protection of Rule 305(j), or engage in self-help to secure possession.

Finally, as required under Rule 305(j), Rosemary failed to perfect a stay of judgment in order to bar its application. A stay of judgment is collateral to the judgment and does not affect or alter the issues on appeal. See *In re Estate of Goodlett,* 225 Ill.App.3d 581, 587, 167 Ill.Dec. 726, 588 N.E.2d 367 (1992). The Illinois Supreme Court rules provide clear direction regarding stay of judgments and the recourse available in the event a trial court denies a stay of judgment. Rule 305(d) authorizes litigants to make a motion in the reviewing court for a stay of judgment following denial of the same motion by the trial court. 155 Ill.2d R. 305(d). As noted by our appellate court, even if the motion before the trial court was denied in error, the recourse remains unchanged, and the party must renew the motion in the appellate court. *In re Estate of Bork,* 145 Ill.App.3d 920, 930, 99 Ill.Dec. 754, 496 N.E.2d 329 (1986); *Horvath v. Loesch,* 87 Ill.App.3d 615, 620, 43 Ill.Dec. 154, 410 N.E.2d 154 (1980). Rule 305 requires that a litigant must "show that application to the trial court is not practical, or that the trial court has denied an application or has failed to afford the relief that the applicant requested." 155 Ill.2d R. 305(d). Moreover, under Rule 305(j), a stay must be "perfected within the time for filing notice of appeal." 155 Ill.2d R. 305(j).

On October 2, 1998, Rosemary filed a "Motion for Stay of Judgment Pending Appeal and Rehearing Re: Deposition." This motion was denied by the trial court on October

30, 1998. Contrary to the requirement in Rule 305(j), Rosemary never renewed her motion to stay in the reviewing court.[4] Therefore, under Rule 305(j), Moser's rights in the Kendall County property are protected and the relief Rosemary sought – a judgment voiding the sale to Moser – cannot be granted. Rather, her appeal is moot.

Rosemary's *pro se* status does not alter this result. *Pro se* litigants are presumed to have full knowledge of applicable court rules and procedures, including procedural deadlines with respect to filing motions. See *Domenella v. Domenella,* 159 Ill.App.3d 862, 868, 111 Ill.Dec. 771, 513 N.E.2d 17 (1987) (construing Rule 303(a), holding that *pro se* defendants must comply with the same rules of procedure as would be required of litigants represented by an attorney). Moreover, despite Rosemary's *pro se* status, the record does not indicate that she was ignorant of court rules and procedures. In fact, the record shows that

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[4] Tangentially, we note that Rosemary's notice of appeal directed against, in part, the October 30 order denying her motion to stay does not satisfy Rule 305(d). A notice of appeal is not an application of stay within the meaning of this court's rules. Rather, our rules clearly distinguish between a notice of appeal and motion to stay. Compare 155 Ill.2d R. 303(b) with 155 Ill.2d R. 305. Further, the mere nature and effect of the notice of appeal and motion to stay illustrate that they are not synonymous. A notice of appeal is a procedural device filed with the trial court, that when timely filed vests jurisdiction in the appellate court in order to permit review of the judgment such that it may be affirmed, reversed, or modified. *Berg,* 193 Ill.2d at 189, 249 Ill.Dec. 770, 737 N.E.2d 160. A motion to stay impacts the enforcement and effect of the judgment, but does not challenge the sufficiency of that judgment.

The dissent also maintains that additional irregularities suggest fraud in the sale. The dissent fails to explain how this overcomes Rule 305(j) and Rosemary's failure to file a motion to stay in the appellate court.

Rosemary litigated this matter, including the filing of motions, responses, and court appearances, for several years prior to the trial court's final judgment. Rule 305(d) clearly explained her recourse following the dismissal of her motion to stay in the trial court. This court cannot excuse her failure to follow procedure in order to bar the application of Rule 305(j).

Public policy of this state supports our conclusion. Illinois law protects the integrity and finality of property sales, including judicial sales. *Dixon v. City National Bank,* 81 Ill.2d 429, 433, 43 Ill.Dec. 710, 410 N.E.2d 843 (1980); *Checkley & Co. v. Citizens National Bank,* 43 Ill.2d 347, 350, 253 N.E.2d 441 (1969); *Blancett v. Taylor,* 6 Ill.2d 434, 438, 128 N.E.2d 916 (1955); *Shultz v. Milburn,* 366 Ill. 400, 405, 9 N.E.2d 199 (1937); *Levy v. Broadway-Carmen Building Corp.,* 366 Ill. 279, 282-83, 8 N.E.2d 671 (1937); *Smith v. Herdlicka,* 323 Ill. 585, 592-93, 154 N.E. 414 (1926); *Crist v. McCoy,* 287 Ill. 641, 647, 122 N.E. 857 (1919); *Osmond v. Evans,* 269 Ill. 278, 284, 110 N.E. 16 (1915); *Conover v. Musgrave,* 68 Ill. 58, 62 (1873). Indeed, it extends this protection to purchasers who without notice at the time of the purchase buy in good faith. This finality and permanence is relied on by both purchasers and others in connection with the purchase of the property, including financial institutions, title insurers, realtors, and tenants. Absent this policy, no person would purchase real property involved in a judicial proceeding, if afterwards he incurred the hazard of losing the property due to facts unknown to him at the time of the sale. A party may avoid the harshness of this rule by complying with the procedural mechanisms available, such as a motion to stay enforcement of the judgment and sale.

The dissent suggests that this court ignore the plain language of Rule 305(j) and strong public policy favoring the finality and permanence of judicial sales to address alleged procedural irregularities occurring during the sale. This opinion declines to address or outline those irregularities because they are secondary to Rule 305(j).

The dissent maintains that the trial court lacked authority to order the sale because it failed to comply with the Act, and that this rendered the judgment "void." According to the dissent, failure to follow the Act is fatal to the circuit court's jurisdiction. The Act, the dissent argues, gives the circuit court the "inherent authority" to adjudicate the controversy and, therefore, failure to follow procedure under the Act divests the court of jurisdiction and renders the order "void." See 197 Ill.2d at 543-45, 259 Ill.Dec. at 747, 759 N.E.2d at 527, (Freeman, J., dissenting, joined by McMorrow and Kilbride, JJ.), citing *In re M.M.,* 156 Ill.2d 53, 189 Ill.Dec. 1, 619 N.E.2d 702 (1993); *People v. Wade,* 116 Ill.2d 1, 107 Ill.Dec. 63, 506 N.E.2d 954 (1987); *Peck v. Peck,* 16 Ill.2d 268, 157 N.E.2d 249 (1959); *Armstrong v. Obucino,* 300 Ill. 140, 133 N.E. 58 (1921); *Woodward v. Ruel,* 355 Ill. 163, 188 N.E. 911 (1933); *Maloney v. Dewey,* 127 Ill. 395, 19 N.E. 848 (1889). According to the dissent, if the judgment is "void" Rule 305(j) would not apply.

The dissent mistakenly relies upon a rule of law not applicable to the present circumstances. The "inherent authority" requirement existed before reform to the judicial system in 1964. Effective January 1, 1964, an amendment to article VI replaced limited jurisdiction: "Circuit Court[s] shall have unlimited original jurisdiction of all justiciable matters." Ill. Const. 1870, art. VI, § 9 (amended 1964); accord Ill. Const. 1970, art. VI, § 9

("Circuit Courts shall have original jurisdiction of all justiciable matters except when the Supreme Court has original and exclusive jurisdiction"). This amendment created a single integrated trial court vested with jurisdiction to adjudicate all controversies. *Zamarron v. Pucinski,* 282 Ill.App.3d 354, 360, 218 Ill.Dec. 23, 668 N.E.2d 186 (1996). Thus, the "inherent power" requirement applies to courts of limited jurisdiction and administrative agencies. As we noted in *City of Chicago v. Fair Employment Practices Comm'n,* 65 Ill.2d 108, 112, 2 Ill.Dec. 711, 357 N.E.2d 1154 (1976):

> "We believe the jurisdictional rule applicable to the Commission is analogous to that governing the courts of *limited jurisdiction and powers formerly existing in our pre-1964 judicial system.* In the context of cases involving the validity of orders or judgments of *those courts,* this court has said: 'A judgment, order or decree entered by a court which lacks jurisdiction of the parties or of the subject matter or which lacks the inherent power to make or enter the particular order involved, is void * * * .'" (Emphases added and omitted.)

An administrative agency, like the pre-1964 circuit courts, is powerless to act unless statutory authority exists. *City of Chicago,* 65 Ill.2d at 112, 2 Ill.Dec. 711, 357 N.E.2d 1154. An administrative agency is a statutory creature with no general or common law power. *City of Chicago,* 65 Ill.2d at 112-13, 2 Ill.Dec. 711, 357 N.E.2d 1154. Conversely, a circuit court is a court of general jurisdiction, which need not look to the statute for its jurisdictional authority.

Importantly, the dissent overlooks our recent discussion explaining the distinction between "void" and

"voidable" judgments. In *Mitchell* we stated that "[t]he question whether a judgment is void or voidable depends on whether the court entering the challenged order possessed jurisdiction over the parties and the subject matter. [Citation.] If jurisdiction is lacking, any subsequent judgment of the court is rendered void * * * ." *In re Marriage of Mitchell,* 181 Ill.2d 169, 174, 229 Ill.Dec. 508, 692 N.E.2d 281 (1998), quoting *People v. Davis,* 156 Ill.2d 149, 155-56, 189 Ill.Dec. 49, 619 N.E.2d 750 (1993).

Significantly, the dissent does not dispute that the trial court in the present case had both subject matter jurisdiction and personal jurisdiction over the parties. For this reason, the judgment is not "void." This is true even if we were to assume that the trial court failed to strictly follow the provisions of the Act.

In *Mitchell,* a wife argued that the settlement agreement was "void" because the trial judge specified child support payments as a percentage rather than a dollar amount, and so failed to comply with procedures set forth in the Illinois Marriage and Dissolution of Marriage Act. *In re Marriage of Mitchell,* 181 Ill.2d at 171-73, 229 Ill.Dec. 508, 692 N.E.2d 281. We agreed that the trial judge failed to follow the precise terms of the Act. However, we reversed the order of the appellate court finding the judgment "void":

> "In exercising this jurisdiction, however, the trial court judge entered a judgment that was contrary to the statute. * * * The error in judgment, however, is not enough to divest the court of jurisdiction to enter the order. The judge had jurisdiction of the parties and subject matter, and, although the judgment was erroneous, the judge had authority to enter the child

> support order." *In re Marriage of Mitchell,* 181 Ill.2d at 175, 229 Ill.Dec. 508, 692 N.E.2d 281.

Clearly, under this holding, even if the trial court failed to follow the precise terms of the Act or entered a judgment in error, the resulting judgment is not "void."

Quoting a more recent decision, *People v. Davis,* the dissent asserts that failure to comply with a statute is tantamount to a jurisdictional defect and renders the judgment "void." 197 Ill.2d at 547, 259 Ill.Dec. at 747, 759 N.E.2d at 526, (Freeman, J., dissenting, joined by McMorrow and Kilbride, JJ.), quoting *Davis,* 156 Ill.2d at 156, 189 Ill.Dec. 49, 619 N.E.2d 750 ("the power [conferred by the statute] to render the particular judgment or sentence is as important an element of jurisdiction as its personal jurisdiction and subject matter jurisdiction"). Initially, we observe that *Davis* discusses jurisdiction "in the context of criminal proceedings." *Davis,* 156 Ill.2d at 156, 189 Ill.Dec. 49, 619 N.E.2d 750. Criminal proceedings that involve the power to render judgments or sentences address a separate set of concerns not at issue in the present matter. Nevertheless, *Davis* does not hold that failure to comply with a statute robs a court of jurisdiction. Instead, we held that, "[w]hether a judgment is void or voidable presents a question of jurisdiction." *Davis,* 156 Ill.2d at 155, 189 Ill.Dec. 49, 619 N.E.2d 750. Yet, jurisdiction is not affected by an incorrect judgment: "jurisdiction or power to render a particular judgment does not mean that the judgment rendered must be the one that should have been rendered, for the power to decide carries with it the power to decide wrong as well as to decide right." *Davis,* 156 Ill.2d at 156, 189 Ill.Dec. 49, 619 N.E.2d 750. For this reason, this court held that although the erroneous judgment was "voidable," the error in sentencing under the statute did not divest

jurisdiction. *Davis,* 156 Ill.2d at 157-58, 189 Ill.Dec. 49, 619 N.E.2d 750.

Plainly, the judgment of the circuit court is not "void" and the provisions of Rule 305(j) apply. On September 24, 1998, when the trial court confirmed the sale of property to Moser and directed a quitclaim deed be recorded in its name, Moser was a nonparty to the action between John, Jerome, and Rosemary. Moreover, the property passed pursuant to a final judgment in a circuit court with jurisdiction. Rosemary failed to perfect a stay of that judgment. Thus, according to Rule 305(j) there was no longer any justiciable issue for which an appellate court could grant relief. As noted earlier, the power of appellate review is confined to the "consideration of actual controversies, cases in which the judgment can be given effect." *Barnard v. Michael,* 392 Ill. 130, 133-34, 63 N.E.2d 858 (1945).

For the foregoing reasons, we find it unnecessary to address the remaining contentions on the merits. The judgment of the appellate court is reversed and the judgment of the circuit court is affirmed.

Appellate court judgment reversed; circuit court judgment affirmed.

Justice FREEMAN, dissenting:

Today, the majority extends the protection of our Rule 305(j) (155 Ill.2d R. 305(j)) to a sale ordered by the circuit court in a partition action brought by plaintiff, John Steinbrecher, against defendants, Rosemary C. Steinbrecher and Jerome Steinbrecher. The majority does so without addressing completely the concerns raised by Rosemary regarding the authority of the circuit court to order the sale. The majority does so without due concern

that defendants have been deprived of their property under circumstances which, at best, evince a forced sale of the property, and, at worst, suggest that the sale was fraudulent. Indeed, the majority asserts that a fraudulent sale merits the protection of our Rule 305(j). Further, in its haste to extend Rule 305(j) protection to this sale, the majority overrules long settled precedent regarding the elements of jurisdiction, and the equally settled precedent that this court will not countenance fraud. Because I believe that this court has a responsibility to examine matters of jurisdiction, and an affirmative duty to refrain from condoning fraud, I respectfully dissent.

FACTUAL BACKGROUND

The facts as stated in the majority opinion require elaboration. In the complaint for partition filed on November 28, 1995, plaintiff represented that he and defendants, the heirs and beneficiaries of the estate of Francis J. Steinbrecher, held title to the property as tenants in common. Plaintiff named as additional defendants Hinsdale Nurseries, Inc., C.D.'s Trees Service, and David Mukelson, tenants in possession of certain portions of the property, and Farm Credit Services of Northern Illinois, the holder of a mortgage on a portion of the property. Plaintiff did not name the estate as a defendant even though the estate only released its interest in the property on January 31, 1997.

On April 26, 1996, plaintiff requested that the circuit court appoint a commissioner to assess the feasibility of a partition. On May 5, 1996, the court appointed Chicago Title & Trust Company, as a single commissioner, to

partition the property. Chicago Title declined the appointment and, eventually, Michael R. Crowley was appointed as a substitute commissioner. Prior to the appointment of Crowley as substitute commissioner, the court did not ascertain and declare the rights, titles and interest of all the parties in the action, nor did it enter judgment of partition according to the rights of the parties. Further, Crowley did not take and subscribe an oath that he would fairly and impartially partition the property according to the rights and interests of the parties as declared by judgment of the court.

On March 11, 1997, Crowley submitted an "Appraisal/Commissioner's Report" to the court. In the report, Crowley valued the property, consisting of three parcels of land with a total of 409 acres, at $4,500,000. Crowley noted that, if the three parcels were sold individually, the value of the property would be $4,859,000. The values ascribed were as of August 30, 1996.

For purposes of partition, Crowley divided the three parcels into five segments. Crowley then stated:

> "One of the purposes of this analysis is to recommend to the client an equitable distribution of the various segments and parcels of the subject property among three parties. The appraiser considered various permutations of the five various segments, with individual values of $1,595,000; $1,608,000; $1,008,000; $426,000; and $222,000.
>
> None of the combinations of these five segments resulted in three relatively equal units. The closest combination to this target was: the South Segment of Parcel # 1 at $1,595,000, the North Segment of Parcel # 1 at $1,608,000, leaving all of Parcel # 2 at

> $1,434,000, and all of Parcel # 3 at $222,000, for a total of $1,656,000 as the third unit.
>
> While the first and second combinations resulted in relatively similar values, the third combination was substantially greater. And therefore, the appraiser, acting as the court appointed commissioner, was unable to recommend an equitable distribution of these assets among three parties unless other compensation was provided to the first two combinations and/or some concession was applied to the third."

At a bench trial in August 1997, Crowley testified that the three parcels were not contiguous. Parcel 1 was located approximately one mile from parcels 2 and 3. If the three parcels were sold as a unit, the property would be on the market for a longer period of time. Additionally, a buyer would likely discount the price paid for the property as a whole. Again, Crowley noted that the appraised value of the property as a whole was $359,000 less than the appraised value of the three parcels.

Crowley testified that in attempting to partition the land, he divided parcels 1 and 2 into four segments. He believed that each parcel should be so divided because the parcels were bisected by a road. Adding parcel 3 to parcels 1 and 2, he obtained five segments that he attempted to partition equally. In his opinion, an equitable distribution or partition of the property in kind was not feasible unless some concession was made for the financial inequality between the three parcels as proposed for partition. Crowley did not consider further subdividing the 409 acres to arrive at a more equal partition of the property.

In a letter to all parties dated October 1, 1997, the court stated that the property could not be divided amongst the three heirs. The court ordered a public sale of

the property, with the terms and notice of sale to be decided at a later date. Subsequently, in an order dated October 28, 1997, the court found that the three heirs were the owners of the property, each holding interests of an undivided one-third, as tenants in common. Further, the court found that the property could not be divided without manifest prejudice to the owners. The court ordered that the entire property be sold at public sale on terms agreed to between the parties or further ordered by the court. The court denied Rosemary's motion for a stay of judgment pending appeal, and set the appeal bond at $3 million.

Upon motion of plaintiff, the court approved a contract for the real estate firm of Dolan and Murphy to sell the property. According to the contract, Dolan and Murphy had the exclusive right to sell the property for the period beginning January 9, 1998, and ending April 7, 1998. The contract was not renewed in April 1998. However, the court allowed Dolan and Murphy to continue marketing the property. On July 16, 1998, Dolan and Murphy forwarded to the clerk of the circuit court a contract submitted by Inland Real Estate Development Corporation for the purchase of the property. The purchase price proposed by Inland was $3.5 million. On July 28, 1998, Dolan and Murphy forwarded to the clerk of the circuit court a contract submitted by Robert Hamman to purchase the property for $3,050,000.

At a hearing on July 30, 1998, plaintiff requested that the court approve one of the contracts submitted by Dolan and Murphy. Jerome objected to approval of the contracts, and the court continued the hearing to August 19, 1998. The night before the continued hearing, Dolan and Murphy mailed to the clerk of the circuit court a contract submitted by Moser Enterprises Inc., for the purchase of

the property. The contract listed a purchase price of $3,550,000, $50,000 more than the purchase price proposed by Inland. At the hearing on August 19, 1998, plaintiff tendered copies of the Moser contract to the judge, and defendants. Over defendants' objections, the court approved the Moser contract. Subsequently, the court denied Rosemary's motion for rehearing.

On September 4, 1998, Inland filed a petition for leave to intervene and a motion to reconsider the order of August 19, 1998. Initially, Inland noted that its contract to purchase the property was a matter of record in the proceeding and was file stamped by the clerk of the court on July 20, 1998. Moser's contract to purchase the property was file stamped on August 19, 1998. Inland also noted that Dolan and Murphy did not advise Inland that Moser had submitted a contract to purchase the property. To the contrary, Dolan and Murphy advised Inland that the Inland contract would be approved by the court at the hearing on August 19, 1998. Relying on this representation, Inland did not attend the hearing.

Inland suggested that the court allow the parties to submit additional sealed offers to purchase the property. Inland represented to the court that it would make another offer, on terms comparable to Moser's offer, with a higher purchase price. Inland believed that fundamental fairness to the buyers and to the heirs supported reopening the bids. At a hearing on September 24, 1998, plaintiff's counsel admitted telling Inland that Inland's offer to purchase the property was the highest offer received. He also told Inland that if the court were to approve one of the offers it would be the one Inland submitted. He testified, however, that Dolan and Murphy received Moser's offer to purchase the property the night before the hearing. The

circuit court denied Inland's petition for leave to intervene and confirmed the sale to Moser.

ANALYSIS

A. Court's Statutory Authority

In the circuit court proceedings, as on appeal, Rosemary maintained that the circuit court's judgment, and the sale pursuant thereto, were void because the circuit court failed to comply with the partition act in several aspects. Since the circuit court derived its authority to sell the property from the Act, Rosemary argued that the court's failure to follow the dictates of the Act was jurisdictional.

The majority does not detail the aspects in which the circuit court failed to comply with the Act nor does it consider whether the circuit court exceeded its authority by failing to comply with any particular provision of the Act. I will outline the four allegations I find most troubling.

First, Rosemary alleged that the circuit court appointed a commissioner to partition the property without first ascertaining the rights, titles and interest of all the parties to the action. Section 17-105 of the Act provides:

> "Judgment. The court shall ascertain and declare the rights, titles and interest of all the parties in such action, the plaintiffs as well as the defendants, and shall enter judgment according to the rights of the parties." 735 ILCS 5/17-105 (West 1996).

Section 17-108 of the Act provides:

> "Duty of Commissioners. The commissioners shall enter upon the premises and, if the same are

> susceptible of division without manifest prejudice to the rights of the parties, they shall make partition thereof, allotting the several shares to the respective parties, quality and quantity relatively considered, according to their respective rights and interests as adjudged by the court * * * . If the premises are not susceptible of division without manifest prejudice to the parties in interest, the commissioners shall value each piece or parcel separately." 735 ILCS 5/17-108 (West 1998).

Thus, the circuit court must declare the rights of the parties and enter a judgment of partition according to those rights before it appoints commissioners to partition the premises. Indeed, the commissioners are not able to partition the premises without direction from the court regarding the rights and interest of the parties. Without such direction, the commissioners simply do not know the identities of the owners and what portion of the land each owner is entitled to.

The circuit court appointed Crowley substitute commissioner on August 30, 1996. Crowley submitted his report to the court on March 11, 1997. Subsequently, in its order of October 28, 1997, the court found that the three heirs were the owners of the property, holding interest of an undivided one-third each, as tenants in common. It thus appears that the court did not comply with the requirements of the Act.

Second, Rosemary alleged the circuit court failed to require that Crowley take an oath, as commissioner, to fairly and impartially partition the property. Section 17-107 of the Act provides:

> "Oath of Commissioners. Each commissioner shall take and subscribe an oath or affirmation fairly

> and impartially to make partition of the premises, according to the rights and interests of the parties, as declared by the judgment of the court, if the same can be done consistently with the interests of the parties; or, if the same cannot be so divided without manifest prejudice to the parties in interest, that they will fairly and impartially appraise the value of each piece or parcel of the premises sought to be divided, and make a true report to the court." 735 ILCS 5/17-107 (West 1996).

In *Tibbs v. Allen,* 27 Ill. 119 (1862), this court noted that the commissioners appointed by the circuit court in the partition action did not take the oath prescribed by statute. "They were not sworn to make partition, 'in accordance with the judgment of the court as to the rights and interests of the parties,' but only sworn to divide the land according to their own opinions of those rights and interests, without regard to the judgment of the court." *Tibbs,* 27 Ill. at 126-27. For this, and other reasons, this court reversed the decree for the sale of property and remanded for further proceedings. See also *Sullivan v. Sullivan,* 42 Ill. 315, 319 (1866) ("After their appointment, and they have taken the oath required by the statute, then, and not till then, are they clothed with legal authority to act as commissioners").

In the present case, the record confirms that Crowley did not take an oath as commissioner.

Third, Rosemary alleged that the circuit court was not authorized to sell the property because Crowley did not report that the property could not be divided in kind. Section 17-116 of the Act provides:

> "Sale of premises not susceptible to division. When the whole or any of the premises sought to be

> partitioned cannot be divided without manifest prejudice to the owners thereof, and the commissioners appointed to divide the same so report, the court shall order the premises not susceptible of division to be sold at public sale, upon such terms and notice of sale as the court directs." 735 ILCS 5/17-116 (West 1996).

Thus, it is only upon a finding by the commissioners that the property is not susceptible of division that the circuit court will order a sale of the property.

Crowley's report states:

> "While the first and second combinations resulted in relatively similar values, the third combination was substantially greater. And therefore, the appraiser, acting as the court appointed commissioner, was unable to recommend an equitable distribution of these assets among three parties *unless* other compensation was provided to the first two combinations and/or some concession was applied to the third." (Emphasis added.)

Was Crowley thereby making an unequivocal statement that the property could not be partitioned without manifest prejudice to the parties in interest, or was Crowley suggesting that the property could be partitioned subject to additional compensation to some of the owners? If the actual finding was that the property could be divided subject to owelty payments, the circuit court could not direct that the property be sold. In so doing, the circuit court would have exceeded its authority under the statute.

In *Peck v. Peck,* 16 Ill.2d 268, 157 N.E.2d 249 (1959), this court held that a judgment of partition was invalid because it was not in conformity with the partition act. The court observed:

> "The object of partition is to enable those who own property in common to sever their interests, so that each one may take possession of, enjoy, and improve his separate estate at his own pleasure. [Citations.] The law favors a division of land in kind, rather than a division of the proceeds of a sale thereof, and a sale under partition is proper only where a division of the premises cannot be made without prejudice to the rights of the interested parties. [Citations.] To implement this policy our statute provides for the appointment of commissioners to determine whether property is susceptible of division, [citation] and in construing such statute this court has said: ' * * * whether the proceeding for partition is by petition under the statute or by bill in chancery, an essential prerequisite to a decree authorizing a sale is the appointment of commissioners to make partition, and a report by them that the land is not susceptible of partition; * * * section 16 of the Partition Act is mandatory, and * * * where partition is sought by either mode, a decree for sale is erroneous, unless based upon a report of commissioners.' [Citations.] Considering these established principles it is manifest that the court was in error in directing a sale of appellant's interest in the manner prescribed." *Peck,* 16 Ill.2d at 285-86, 157 N.E.2d 249.

This court remanded the cause to the trial court for the entry of a decree in conformity with the partition statute. See also *Rosenbaum v. Rosenbaum,* 38 Ill.App.3d 1, 15, 349 N.E.2d 73 (1976) (The court observed that a decree of sale is erroneous unless it is based on the report of a commissioner or commissioners. Commissioners were not appointed in the case, nor did the report of a commissioner precede the lower court's order of sale. Therefore, the judgment of the court "did not include nor can it be construed to include a valid partition judgment").

Returning to the present facts, the property at issue consisted of 409 acres of land. The very size of the property suggests that some division in kind would have been possible. As this court observed in considering a report that 720 acres of land could not be divided:

> "It would require much proof to induce the belief that so much land could not be divided fairly and equally, according to quantity and quality, among seven claimants." *Tibbs,* 27 Ill. at 128.

Fourth, Rosemary alleged that the circuit court was not authorized to sell the property in any manner other than at public sale. Section 17-116 of the Act provides that "the court shall order the premises not susceptible of division to be sold at public sale." 735 ILCS 5/17-116 (West 1996). The circuit court allowed the property to be listed exclusively with Dolan and Murphy. Contracts to purchase the property were submitted to Dolan and Murphy, and the property was eventually sold to Moser. There was no notice of the property's sale to the public. Nor was there a sale at auction of the property. Thus, it appears that the circuit court did not follow the dictates of the statute in conducting the sale of the property.

The mechanics of the sale of the property in this case demonstrate the problems inherent in a sale which is not at public vendue. Inland's contract to purchase the property was a matter of record in the proceeding and was file stamped by the clerk of the court on July 20, 1998. Moser's contract to purchase the property was mailed to the clerk of the court the evening of August 18, 1998, and was presented to the circuit court at the hearing on August 19, 1998. The purchase price listed in Moser's contract, $3,550,000, was only $50,000 more than the purchase price listed in Inland's contract. Inland was not informed

of Moser's contract, and, consequently, Inland did not increase the purchase price listed in its contract. Moreover, the circuit court refused to reopen bidding on the property.

Three parties submitted contracts for the purchase of the property. These parties were vying for the right to construct new housing in an area undergoing substantial development. Surely, a public sale with all parties aware of the proposed bids would have maximized the returns to the owners of the property.

The majority purports to answer Rosemary's argument in a footnote. See 197 Ill.2d at 524, 259 Ill.Dec. at 735, 759 N.E.2d at 515. Therein, the majority notes that the circuit court had jurisdiction and authority over the parties and the property. The majority also notes that "a circuit court does not lose jurisdiction because it made a mistake in determining the facts, the law, or both."

The majority notes correctly that a court may not lose jurisdiction because it makes a mistake in determining the facts or the law. *People v. Davis,* 156 Ill.2d 149, 156, 189 Ill.Dec. 49, 619 N.E.2d 750 (1993). However, Rosemary did not merely argue that the circuit court made a mistake in determining the facts or the law. Rosemary argued that the circuit court failed to follow the very statute empowering the court to sell the property. As this court observed in *Davis,* "the power to render the particular judgment or sentence is as important an element of jurisdiction as is personal jurisdiction and subject matter jurisdiction." Further, "a judgment or decree may be void where a court has exceeded its authority." *Davis,* 156 Ill.2d at 156, 189 Ill.Dec. 49, 619 N.E.2d 750.

Thus, in *People v. Arna,* 168 Ill.2d 107, 212 Ill.Dec. 963, 658 N.E.2d 445 (1995), this court held void a trial court order which did not conform to a statutory requirement. The trial court had jurisdiction of the parties and subject matter. However, the trial court did not have the inherent authority to enter an order imposing concurrent terms on the defendant.

And in *Armstrong v. Obucino,* 300 Ill. 140, 133 N.E. 58 (1921), this court found that a sale made contrary to statute, and a deed executed in pursuance of such sale, were void. In so doing, this court observed:

> "The statement has very frequently been made that where a court has jurisdiction of the parties and the subject matter, its decree, however erroneous, can only be attacked on appeal or error; but the rule is subject to an exception equally well settled, – that a decree may be void because the court has exceeded its jurisdiction. The bill prayed for the enforcement of the lien by a sale beyond and contrary to the powers given by the statute for enforcing mechanics' liens, and it does not follow that because the court had acquired jurisdiction of the parties and the subject matter it could make such a decree as was prayed for. Courts are limited in the extent and character of their judgments, and if they transcend their lawful powers their judgments and decrees are void and may be collaterally impeached wherever rights claimed under them are brought in question. The doctrine that where a court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and its judgment or decree, however erroneous, cannot be collaterally assailed, is only correct when the court proceeds according to the established modes governing the class to which the case belongs and does not transcend in the extent and character of its

> judgment or decree the law or statute which is applicable to it. [Citations.] Where a court, after acquiring jurisdiction, has assumed to enter a decree for a sale which goes beyond the limits of the jurisdiction and transgresses the law the decree is void, and the sale based thereon is likewise an absolute nullity." *Armstrong,* 300 Ill. at 142-43, 133 N.E. 58.

See also *In re M.M.,* 156 Ill.2d 53, 64, 189 Ill.Dec. 1, 619 N.E.2d 702 (1993) (jurisdiction is "the power of the court to adjudge concerning the general question involved [citation], as well as the power to grant the particular relief requested [citations]. Every act of the court beyond that power is void"); *People v. Wade,* 116 Ill.2d 1, 107 Ill.Dec. 63, 506 N.E.2d 954 (1987); *Woodward v. Ruel,* 355 Ill. 163, 173, 188 N.E. 911 (1933) (Stone, J., dissenting) ("One of the essentials of a valid judgment is that the court have jurisdiction to render that particular judgment. Where a court, after acquiring jurisdiction of the subject matter, transcends the limits of the jurisdiction conferred, its judgment so entered is void"); *Maloney v. Dewey,* 127 Ill. 395, 402-03, 19 N.E. 848 (1889) (where a court, having jurisdiction of the person, and jurisdiction to adjudicate upon the subject matter, renders a judgment not authorized by law in that class of cases, under any possible proofs, its judgment is not an instance of mere misapplication of law to particular facts, or erroneous interpretation of rules in particular cases, but an attempt to exercise an authority which has no existence in the particular case).

To answer Rosemary's contention, the majority must actually determine whether the circuit court exceeded its authority in ordering the sale of the property, and whether the circuit court's failure to follow the Act rendered its judgment void. The majority is unwilling to do so.

Instead, citing *In re Marriage of Mitchell,* 181 Ill.2d 169, 229 Ill.Dec. 508, 692 N.E.2d 281 (1998), the majority suggests that I "overlook[ed] our recent discussion explaining the distinction between 'void' and 'voidable' judgments." 197 Ill.2d at 530, 259 Ill.Dec. at 739, 759 N.E.2d at 519. The majority educates:

> "In *Mitchell* we stated that '[t]he question whether a judgment is void or voidable depends on whether the court entering the challenged order possessed jurisdiction over the parties and the subject matter. [Citation.] If jurisdiction is lacking, any subsequent judgment of the court is rendered void * * * .' *In re Marriage of Mitchell,* 181 Ill.2d 169, 174 [229 Ill.Dec. 508, 692 N.E.2d 281] (1998), quoting *People v. Davis,* 156 Ill.2d 149, 155-56 [189 Ill.Dec. 49, 619 N.E.2d 750] (1993).
>
> Significantly, the dissent does not dispute that the trial court in the present case had both subject matter jurisdiction and personal jurisdiction over the parties. For this reason, the judgment is not 'void.'
>
> This is true even if we were to assume that the trial court failed to strictly follow the provisions of the Act." 197 Ill.2d at 530-31, 259 Ill.Dec. at 740, 759 N.E.2d at 520.

Thus, according to the majority, a judgment rendered by a court lacking the inherent power to make or enter the particular order involved is not "void" but merely "voidable."

I note that *Mitchell* relied primarily upon *Davis,* a decision which affirmed that "the power to render the particular judgment or sentence is as important an element of jurisdiction as is personal jurisdiction and subject matter jurisdiction." *Davis,* 156 Ill.2d at 156, 189 Ill.Dec.

49, 619 N.E.2d 750. I also note that *Mitchell* nowhere states that it is overruling *Davis* or the precedent from which *Davis* is derived. See also *Wade,* 116 Ill.2d at 5, 107 Ill.Dec. 63, 506 N.E.2d 954; *Woodward,* 355 Ill. at 173, 188 N.E. 911 (Stone, J., dissenting); *Maloney,* 127 Ill. at 402, 19 N.E. 848. I am confident that *Mitchell* was not intended to overrule settled precedent on the elements of jurisdiction.

Assuming, however, that *Mitchell* created some confusion as to the continued validity of the requirement that a court have inherent power to make or enter the particular order involved, such confusion was dispelled in *City of Chicago v. Roman,* 184 Ill.2d 504, 510, 235 Ill.Dec. 468, 705 N.E.2d 81 (1998), a decision issued 10 months after *Mitchell,* and one which the majority fails to acknowledge. In *Roman,* 184 Ill.2d at 510, 235 Ill.Dec. 468, 705 N.E.2d 81, this court reiterated that "[a] void judgment is one entered by a court that lacks, *inter alia,* the inherent power to make or enter the particular order involved." See also *People ex rel. Waller v. McKoski,* 195 Ill.2d 393, 401, 254 Ill.Dec. 729, 748 N.E.2d 175 (2001) ("Because the concurrent sentences imposed upon defendant by the circuit court were not authorized by section 5-8-4(b), those sentences are void").

I submit that *Mitchell* is not this court's latest pronouncement on jurisdiction. I also submit that it is the majority, not this dissent, which has failed to acknowledge recent precedent of this court.

The majority offers two distinctions. First, the majority states:

> "*Davis* discusses jurisdiction 'in the context of criminal proceedings.' *Davis,* 156 Ill.2d at 156 [189 Ill.Dec.

> 49, 619 N.E.2d 750]. Criminal proceedings that involve the power to render judgments or sentences address a separate set of concerns not at issue in the present matter." 197 Ill.2d at 532, 259 Ill.Dec. at 740, 759 N.E.2d at 520.

The majority does not elaborate on the nature of these "concerns" or explain why these "concerns" require a different application in the context of a criminal proceeding. Also, the majority does not cite any law in support of the distinction it seeks to draw.

I note that *Davis* cites *Thayer v. Village of Downers Grove,* 369 Ill. 334, 339, 16 N.E.2d 717 (1938), a case involving special assessments and bonds, in support of the proposition that "the power to render the particular judgment or sentence is as important an element of jurisdiction as is personal jurisdiction and subject matter jurisdiction." *Davis,* 156 Ill.2d at 156, 189 Ill.Dec. 49, 619 N.E.2d 750. I also note that *Davis* cites *Armstrong,* 300 Ill. at 142-43, 133 N.E. 58, a mechanics' lien case, in support of the proposition that "a judgment or decree may be void where a court has exceeded its jurisdiction." *Davis,* 156 Ill.2d at 156, 189 Ill.Dec. 49, 619 N.E.2d 750. Thus, *Davis* does not draw a distinction between criminal and civil proceedings and does not provide support for the proposition advanced by the majority.

Further, *Mitchell,* 181 Ill.2d 169, 229 Ill.Dec. 508, 692 N.E.2d 281, the centerpiece of the majority's analysis on jurisdiction, does not support a distinction between jurisdiction in criminal and civil proceedings. At issue in *Mitchell* was the validity of a child support order which expressed the support level as a percentage of income, instead of a dollar amount. As noted above, *Mitchell* relied primarily upon *Davis* in its discussion of jurisdiction.

Thus, *Mitchell,* a civil case, relied upon the holding of *Davis,* a criminal case, without drawing any distinction between civil and criminal proceedings.

McKoski, 195 Ill.2d at 401, 254 Ill.Dec. 729, 748 N.E.2d 175, *Roman,* 184 Ill.2d at 510, 235 Ill.Dec. 468, 705 N.E.2d 81, *Arna,* 168 Ill.2d at 113, 212 Ill.Dec. 963, 658 N.E.2d 445, and *Davis,* 156 Ill.2d at 156, 189 Ill.Dec. 49, 619 N.E.2d 750, all stand for the proposition, as stated in *Roman,* that: "A void judgment is one entered by a court that lacks, *inter alia,* the inherent power to make or enter the particular order involved." This holding cannot be overlooked or disposed of on the ground that *Davis* was a criminal proceeding.

Next, the majority draws a distinction between cases adopted before, and after, the reform to the judicial system in 1964. The majority concedes that the "inherent authority" requirement was a part of this state's jurisprudence before 1964, and applied to the exercise of jurisdiction by our circuit courts. See 197 Ill.2d at 529-30, 259 Ill.Dec. at 739, 759 N.E.2d at 746. However, the majority maintains that, with the implementation of the reform to the judicial system, the circuit courts derive jurisdiction from the constitution and need not act in conformance with statutory authority in order to exercise jurisdiction. The majority explains:

> "The dissent mistakenly relies upon a rule of law not applicable to the present circumstances. The 'inherent authority' requirement existed before reform to the judicial system in 1964. Effective January 1, 1964, an amendment to article VI replaced limited jurisdiction: 'Circuit Court[s] shall have unlimited original jurisdiction of all justiciable matters.' Ill. Const. 1870, art. VI, § 9 (amended 1964); accord Ill.

> Const.1970, art. VI, § 9 ('Circuit Courts shall have original jurisdiction of all justiciable matters except when the Supreme Court has original and exclusive jurisdiction'). This amendment created a single integrated trial court vested with jurisdiction to adjudicate all controversies. [Citation.] Thus, the 'inherent power' requirement applies to courts of limited jurisdiction and administrative agencies." 197 Ill.2d at 529-30, 259 Ill.Dec. at 738, 759 N.E.2d at 518.

The majority concludes that: "a circuit court is a court of general jurisdiction, which need not look to the statute for its jurisdictional authority." 197 Ill.2d at 530, 259 Ill.Dec. at 739, 759 N.E.2d at 746.

This court has rejected the notion that a court of general jurisdiction, which derives its jurisdiction from the constitution, may proceed in derogation of statutory authority. In *In re M.M.,* 156 Ill.2d at 65, 189 Ill.Dec. 1, 619 N.E.2d 702, this court observed: "[I]t is by reason of our constitution that our circuit courts acquire power to adjudge * * * ." However, "it is by reason of the statute that the justiciable matter exists," and the circuit court must proceed within the strictures of the statute. *In re M.M.,* 156 Ill.2d at 65-66, 189 Ill.Dec. 1, 619 N.E.2d 702.

The distinction the majority draws is unavailing. To date, this court has steadfastly recognized that the circuit court must have the inherent power to make or enter the particular order involved. *Roman,* 184 Ill.2d at 510, 235 Ill.Dec. 468, 705 N.E.2d 81. This court has also recognized that "a judgment or decree may be void where a court has exceeded its authority." *Davis,* 156 Ill.2d at 156, 189 Ill.Dec. 49, 619 N.E.2d 750, citing *Armstrong,* 300 Ill. at 142-43, 133 N.E. 58.

The majority misapprehends my dissent. The majority states:

> "The dissent maintains that the trial court lacked authority to order the sale because it failed to comply with the Act, and that this rendered the judgment 'void.' According to the dissent, failure to follow the Act is fatal to the circuit court's jurisdiction. The Act, the dissent argues, gives the circuit court the 'inherent authority' to adjudicate the controversy and, therefore, failure to follow procedure under the Act divests the court of jurisdiction and renders the order 'void.'" 197 Ill.2d at 529, 259 Ill.Dec. at 738, 759 N.E.2d at 518.

I make no pronouncement in my dissent as to the validity of the circuit court's order and the resultant sale. My objective is more modest. I merely ask that the majority address Rosemary's contention that the circuit court's judgment, and the sale pursuant thereto, were void because the circuit court failed to comply with the Act in several aspects. The majority, however, "declines to address or outline those irregularities because they are secondary to Rule 305(j)." 197 Ill.2d at 529, 259 Ill.Dec. at 738, 759 N.E.2d at 518.

B. Fraud in Sale

In her appeal, Rosemary suggested that a fraud was perpetrated in the sale of the property to Moser. She directed this court's attention to Moser's access to information regarding the other contracts to purchase the property; the circumstances surrounding Moser's last minute contract to purchase the property; the lack of notice to defendants regarding Moser's contract to purchase the

property; the representations made to Inland that the circuit court would approve Inland's contract to purchase the property, and that Inland's presence at the hearing was not necessary; the circuit court's denial of Inland's petition for leave to intervene; and the circuit court's refusal to reopen the bidding when presented with an offer $50,000 higher than Moser's.

The majority does not give voice to, or acknowledge Rosemary's argument in any way. I am of the opinion, however, that this court has an affirmative duty to address this argument, for, if the argument is meritorious, it obviates all reasons for extending Rule 305(j) protection to this sale.

From my review of the record, this case appears troubled by irregularities. Plaintiff's complaint for partition was not verified as required by section 17-101 of the Act.[5] See 735 ILCS 5/17-101 (West 1996). Plaintiff averred in November, 1995, that he and defendants held title to the property as tenants in common. In actuality, the estate did not release its interest in the property until January 31, 1997. The circuit court did not ascertain and declare the rights and interest of the parties prior to appointing a commissioner to partition the property. See 735 ILCS 5/17-105, 5/17-108 (West 1996). The circuit court did not require that the commissioner take an oath "fairly and impartially to make partition" of the property. See 735 ILCS 5/17-107 (West 1996). The commissioner's report did

[5] Although the complaint purports to be verified, it was not subscribed and sworn to before a public notary. See *Hough v. Weber,* 202 Ill.App.3d 674, 692, 147 Ill.Dec. 857, 560 N.E.2d 5 (1990).

not contain an unequivocal finding that the property could not be divided. See 735 ILCS 5/17-109 (West 1996). The property was not sold at public vendue.

These irregularities aside, the circuit court ordered the sale of the property as one unit. The property consisted of three parcels of land, with extensive acreage. In his report, Crowley valued the property at $4,859,000 if the three parcels were sold individually, compared to $4,500,000 if the property was sold as a unit. Parcel 1 was located a mile away from parcels 2 and 3. Thus, the sale of the property as a unit could not be justified by contiguity of the parcels. In *Meeker v. Evans,* 25 Ill. 283 (1861), this court observed:

> "It would seem, that when several distinct tracts of land are ordered to be sold by the master, under a decree, it is the duty of that officer to sell each tract separately, unless it is evident that the land will be more valuable in one than in several tracts. [Citation.] It is believed that this rule is of general if not uniform application. * * * When several tracts of land are sold *en masse,* for a gross sum, on the same biddings, the presumption is, that it must have been sold for a smaller amount than they would have brought had each tract been offered separately. When offered *en masse,* persons of limited capital are necessarily precluded from competing at the sale. And when such a sale is made, and an objection is interposed on that ground, to its confirmation, it will be set aside; unless the evidence clearly shows that it has produced more money than it would have done had it been offered in separate parcels." *Meeker,* 25 Ill. at 285.

See also *Bowen v. Bowen,* 265 Ill. 638, 640, 107 N.E. 129 (1914) ("It is the duty of the master in making a sale to offer the land in parcels if the same is susceptible of

division. If the master fails in the performance of his duty in this regard and the lands are thereby sold for an inadequate price the sale will be set aside upon a proper showing").

The circuit court ordered the sale of the property as one unit even though the evidence showed that it would take longer to sell the property as a unit, and the property would fetch a higher price if the parcels were sold individually. This irregularity in the sale of the property, along with the others noted above, fuels concerns that the interest of defendants in the property was not protected.

In *Meeker,* 25 Ill. at 283, this court also stated:

> "In conducting judicial sales good faith must be observed, as well by the purchaser as by the officer, intrusted by the court and the law, to enforce its judgments and decrees, in that mode. The rights of all parties to the proceeding must be regarded and properly protected. When, by a violation of the requirements of the law, by the officer conducting a sale, or by the purchaser at the biddings, the rights of the owner are sacrificed or injuriously affected, the court will interpose, and set aside the sale, and require it to be again offered. Any fraud by the purchaser, by which competition is prevented, or any neglect of duty on the part of the officer producing that result, is regarded as sufficient grounds to order a re-sale." *Meeker,* 25 Ill. at 284.

And, in *Tibbs,* this court observed:

> "When it is considered, that titles to valuable lands can be divested by this statutory proceeding, it is essential the statute should be observed, the courts not tolerating any essential departure from it." *Tibbs,* 27 Ill. at 128.

I could not agree more with this court's assessment that the authority to partition lands also entails a duty to protect the rights and interest of all parties to the lands.

The majority does acknowledge my concerns regarding the possibility of fraud in this matter. In footnote 4 of the opinion, the majority states:

> "The dissent also maintains that additional irregularities suggest fraud in the sale. The dissent fails to explain how this overcomes Rule 305(j) and Rosemary's failure to file a motion to stay in the appellate court." 197 Ill.2d at 527, 259 Ill.Dec. at 737, 759 N.E.2d at 517.

Since the majority requests an explanation, I provide one. This court is a court of equity and justice; this court has an affirmative duty not to condone fraud. Litigants seeking the protection of this court must do equity. Likewise, under our Rule 305(j), a purchaser seeking the protection of this court must have acted in good faith in the purchase of the property.

This court affords protection to *bona fide* purchasers at judicial sales because these purchasers rely upon the court processes and are entitled to a measure of security in their purchases. Where a sale is procured through fraud or collusion between a plaintiff and a purchaser, the purchaser is not only aware of the irregularities in the sale but is an active participant thereto. By what right does that purchaser lay claim to protection of the fraudulent sale? He has not relied upon the court processes, but upon his own actions in effectuating the purchase of the property. To afford him the protection of this court is to place a premium upon his misconduct. And what of the rights of the defendant who has been deprived of his property? It

must be remembered after all that "[w]hilst the law guards the rights of *bona fide* purchasers at judicial sales with scrupulous care, it will protect owners from being deprived of their property by proceedings unauthorized by law." *Morris v. Hogle,* 37 Ill. 150, 155 (1865); see also *Brod v. Brod,* 390 Ill. 312, 325, 61 N.E.2d 675 (1945) ("While the right to partition is an absolute one, [citation] a court of equity will not permit the proceeding to be used to circumvent and avoid the established principles of law and public policy and will, in the exercise of its general, equitable jurisdiction, control the proceedings so as to protect the rights of all parties concerned."); *Bydalek v. Bydalek,* 396 Ill. 65, 71, 71 N.E.2d 19 (1947); *Barnes v. Freed,* 342 Ill. 73, 78, 173 N.E. 795 (1930) (where consideration paid for land was inadequate, purchaser at a judgment sale could retain his advantage only by showing that he acquired his title by proceedings free from fraud or irregularity).

This court has long espoused the principle that a party may obtain relief, on the ground of fraud, against a void as well as a voidable judgment. *Elting v. First National Bank of Biggsville,* 173 Ill. 368, 391, 50 N.E. 1095 (1898), citing *Nelson v. Rockwell,* 14 Ill. 375 (1853). The majority eschews this principle without explaining why this court should place its imprimatur upon, and afford protection to, a sale which may be fraudulent.

Explanations aside, the majority fails to notice that its approach to the fraud issue is somewhat inconsistent with the reasons it advances in support of the circuit court's judgment, and the sale pursuant thereto. The majority states:

> "Public policy of this state supports our conclusion. Illinois law protects the integrity and finality of property sales, including judicial sales. [Citations.]

> Indeed, it extends this protection to *purchasers who without notice at the time of the purchase buy in good faith.* This finality and permanence is relied on by both purchasers and others in connection with the purchase of the property, including financial institutions, title insurers, realtors, and tenants. Absent this policy, no person would purchase real property involved in a judicial proceeding, if afterwards he incurred the hazard of losing the property *due to facts unknown to him at the time of the sale.*" 197 Ill.2d at 528-29, 259 Ill.Dec. at 738, 759 N.E.2d at 518. (Emphases added.)

Thus, the majority recognizes that Illinois law affords protection to good-faith purchasers, that is "purchasers who without notice at the time of the purchase buy in good faith." Further, the majority recognizes that this court extends protection to a good-faith purchaser in order to protect the purchaser from the "hazard of losing the property due to facts unknown to him at the time of the sale." However, the majority refuses to address Rosemary's contention that the sale of the property was fraudulent. Instead, the majority extends the protection of our Rule 305(j) to Moser's purchase of the property. The inconsistency could not be more apparent.

CONCLUSION

Rosemary argued that the judgment of partition, and the sale pursuant thereto, were void because the circuit court did not comply with the requirements of the Act. The majority answers that Rule 305(j) precludes Rosemary from contesting the validity of the partition sale. However, Rosemary's argument called into question whether the circuit court exceeded its statutory authority and whether there was a final judgment in the circuit court. If the

circuit court's judgment, and the resulting sale, are void, Rule 305(j) does not apply, for it is a requirement of the rule that the property passed pursuant to a final judgment. A void judgment may be attacked either directly or indirectly at any time. *Davis,* 156 Ill.2d at 155, 189 Ill.Dec. 49, 619 N.E.2d 750.

In addition, Rosemary questioned whether the sale of the property to Moser was fraudulent. While I do not imply that the sale was fraudulent, the record presents sufficient facts to merit consideration of this issue. In the event due consideration leads to the conclusion that the sale of the property to Moser was fraudulent, I, for one, could not endorse or protect the sale.

I believe this court is duty-bound to protect the rights of all parties to the partition action. The rights of one owner must not be sacrificed or injuriously affected to benefit another. Likewise, the rights of the owner must not be compromised to benefit one who is not a good faith purchaser at a judicial sale. Where it appears that the party seeking partition of the land has colluded with the purchaser to effectuate a fraudulent purchase, that purchase must be set aside.

This court can only fulfill its responsibilities to the owners of the land by examining questions of jurisdiction, and exhibiting intolerance to all manners of fraud and collusion. The majority believes otherwise. In extending Rule 305(j) protection to the present sale, the majority overrules long settled precedent regarding the elements of jurisdiction, and clarifies that fraud is not a sufficient ground to withhold Rule 305(j) protection from a purchaser. My disagreement could not be greater. Accordingly, I dissent.

Justices McMORROW and KILBRIDE join in this dissent.

CAUSE NO. GN1-01701

JOHN STEINBRECHER, Plaintiff, VS. JEROME A. STEINBRECHER and ROSEMARY C. STEINBRECHER, Defendants	§ § § § § § § § § §	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 200TH JUDICIAL DISTRICT

ORDER DENYING DEFENDANT'S MOTION TO VACATE INTERLOCUTORY DEFAULT; ALLOW ANSWER, COUNTERCLAIM AND CROSS CLAIM, AND ACCEPT EVIDENCE OF DIVISIBILITY IN KIND

On the 3rd day of April, 2002, came to be considered the motion of defendant Rosemary C. Steinbrecher to vacate interlocutory default; allow answer, counterclaim and cross claim, and accept evidence of divisibility or partition in kind. Upon consideration of the motion, the documents before the court in the case file and the arguments of movant and counsel for the respondent, John Steinbrecher, the Court finds as follows:

1. The Court considered this motion as a motion for new trial following the entry of an interlocutory default judgment after defendants failed to file a timely answer to the petition;

2. The factors governing consideration of this motion are those set out in *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d, 124 (Tex. 1939), including the following:

   (i) that defendant's failure to answer before judgment was not intentional, or the result of conscious indifference on the defendant's part;

(ii) that the defendant has set up a meritorious defense; and

(iii) that the granting of the new trial will occasion no delay or otherwise work an injury to the plaintiff.

3. The Court finds that defendant, Rosemary C. Steinbrecher, failed to meet her burden of proving each of the factors required for this Court to grant her a new trial.

It is therefore,

ORDERED that all relief requested by Rosemary C. Steinbrecher in her Motion to Vacate Interlocutory Default; Allow Answer, Counterclaim and Cross Claim, and Accept Evidence of Texas and is not an attorney of any party to this case and is not related to any party in this case and that he should be and hereby is appointed as receiver in this case.

3. Chuck Grigson, as receiver is authorized, subject to the control of this Court to do any and all acts necessary to the proper and lawful conduct of the receivership, including the following:

a. Take charge of the Oak Hill Property;

b. Sell the Oak Hill Property for cash or upon such terms as will be approved and confirmed by this court;

c. To pay any tax lien against the interest of Jerome Steinbrecher shall be from his allocable share;

d. All other liens against the Oak Hill Property, if any, shall be paid from the allocable share of the party incurring same;

e. To pay all costs of the receivership, including all costs of sale; and

f. To pay all remaining proceeds, after the payment of the expenses of the receiver and costs of court to the parties, as follows:

John Steinbrecher	one-third of the net proceeds
Jerome A. Steinbrecher	one-third of the net proceeds
Rosemary C. Steinbrecher	one-third of the net proceeds

4. The receiver shall, within 15 days from the date this order was signed, file an inventory of the assets which are the subject of the receivership and shall file a suggestion of the amount of the bond to adequately protect the receivership estate, at which time this Court will set the amount of the receiver's bond.

Signed this 9th day of May, 2002.

/s/ John Dietz
John Dietz, District Judge

CAUSE NO. GN1-01701

JOHN STEINBRECHER, Plaintiff, VS. JEROME A. STEINBRECHER and ROSEMARY C. STEINBRECHER, Defendants	§ § § § § § § § § §	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 200TH JUDICIAL DISTRICT

ORDER APPOINTING RECEIVER

On the 3rd day of April, 2002, came to be considered the motion of John Steinbrecher for appointment of a receiver. In appeal court, defendant Rosemary C. Steinbrecher consented to the Court taking up the motion of the same time as her motion for new trial regarding the interlocutory default judgment. Upon consideration of the motion, the documents before the court in the case file and the arguments of the parties, it is ORDERED, DECREED and FOUND:

1. An interlocutory default judgment was entered against defendant on January 8, 2002. The Default Judgment determined that:

    a. That Plaintiff and Defendants own 13,885 acres out of the T. Anderson Abstract No. 28, Survey 93, Travis County, Texas, more specifically described on Exhibit A attached to the Default Judgment (the "Oak Hill Property");

    b. That Plaintiff and Defendants own the Oak Hill Property as tenants in common, as follows:

John Steinbrecher	one-third undivided interest
Jerome A. Steinbrecher	one-third undivided interest
Rosemary C. Steinbrecher	one-third undivided interest

c. That Plaintiff is entitled to have the Oak Hill Property partitioned;

d. That the Oak Hill Property is incapable of partition in kind and that a fair and equitable division of the property in kind cannot be made; and

e. That a receiver be appointed to sell the Oak Hill Property.

2. Upon consideration of Plaintiff's Motion to Appoint receiver, this court finds that Chuck Grigson, attorney, is qualified to be appointed receiver, that he is a resident of Travis County, Texas and is not an attorney of any party to this case and is not related to any party in this case and that he should be and hereby is appointed as receiver in this case.

3. Chuck Grigson, as receiver is authorized, subject to the control of this Court to do any and all acts necessary to the proper and lawful contract of the receivership, including the following:

a. Take charge of the Oak Hill Property;

b. Sell the Oak Hill Property for cash or upon such terms as will be approved and confirmed by this court;

c. To pay any tax lien against the interest of Jerome Steinbrecher shall be from his allocable share;

d. All other liens against the Oak Hill Property, if any, shall be paid from the allocable share of the party insuring same;

e. To pay all costs of the receivership, including all costs of sale, and

f. To pay all remaining proceeds, after the payment of the expenses of the receiver and costs of court to the petition, as follows:

John Steinbrecher	one-third of the net proceeds
Jerome A. Steinbrecher	one-third of the net proceeds
Rosemary C. Steinbrecher	one-third of the net proceeds

4. The receiver shall, within 15 days from the date this order was signed, file an inventory of the assets which are the subject of the receivership and shall file suggestion of the amount of the bond to adequately protect the receivership estate, at which time this Court will set the amount of the receiver's bond.

Signed this 9th day of May, 2002.

/s/ John K. Dietz
John K. Dietz, District Judge

CAUSE NO. GN1-01701

JOHN STEINBRECHER, Plaintiff, v. JEROME A. STEINBRECHER and ROSEMARY C. STEINBRECHER, Defendants.	§ § § § § § § § §	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 126TH JUDICIAL DISTRICT

ORDER OVERRULING ROSEMARY STEINBRECHER'S MOTION TO RECONSIDER ORDERS OF MAY 9, 2002

On July 17, 2002, the Court held a hearing on the motion of Rosemary Steinbrecher to reconsider the orders signed on May 9, 2002 by Judge Dietz. [Order denying Defendant's motion to vacate interlocutory default, allow answer, counterclaim and crossclaim and accept evidence of divisibility in kind and Order appointing receiver]. At the conclusion of the hearing the Court indicated that the motion to reconsider was overruled and further ordered that this matter be referred to mediation pursuant to Rule 17.4(c) of the Local Rules of the Travis County District Courts, with all parties and the receiver being present at the mediation. It is accordingly

ORDERED, ADJUDGED and DECREED that the motion of Rosemary Steinbrecher to reconsider the orders of May 9, 2002, is hereby OVERRULED; it is further

ORDERED, ADJUDGED and DECREED that this matter be referred to a mediator to be selected by agreement

of the parties, or if there is no agreement, by Charles O. Grigson, receiver.

SIGNED the ___ day of _____, 2002.

_____
PAUL DAVIS
PRESIDING JUDGE

CAUSE NO. GN1-01701

JOHN STEINBRECHER, Plaintiff, VS. JEROME A. STEINBRECHER and ROSEMARY C. STEINBRECHER, Defendants.	§ § § § § § § § § §	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 200TH JUDICIAL DISTRICT

Interlocutory DEFAULT JUDGMENT

On the 8 day of January, 2001, came to be heard the above-entitled and numbered cause. The Plaintiff appeared through his attorneys of record. The defendants, although having been duly and legally cited to appear and answer, failed to appear, and wholly made default.

Citation were served according to law and returned to the clerk where they remained on file for the time required by law. The Court has read the pleadings and the papers of file and is of the opinion that the allegations of plaintiff's petition have been admitted.

IT IS THEREFORE, ORDERED, ADJUDGED, DECREED AND FOUND that Plaintiff have and recover a judgment as follows:

a. That plaintiff and Defendants own 13.885 acres out of the Anderson Abstract No. 28, Survey 93, Travis County, Texas, more specifically described on Exhibit A attached hereto (the "Oak Hill Property");

b. That Plaintiff and Defendants own the Oak Hill Property as tenants in common, as follows:

John Steinbrecher
one-third undivided interest
Jerome A. Steinbrecher
one-third undivided interest
Rosemary C. Steinbrecher
one-third undivided interest;

c. That Plaintiff is entitled to have the Oak Hill Property partitioned;

d. That the Oak Hill Property is incapable of partition in kind and that a fair and equitable division of the property in kind cannot be made.

IT IS FURTHER, ORDERED, ADJUDGED AND DECREED that this court will appoint a receiver to sell the Oak Hill Property at public or private sale and to pay the expenses of sale and any liens against the property. The receiver will be a resident of Travis County, Texas and not an attorney or related to any party to this action and shall be a proper person to act as receiver. On the filing of the receiver's bond, the receiver shall be authorized, subject to control of this court, to do any and all acts necessary to the proper and lawful conduct of the receivership, including the following:

1. Take charge of the Oak Hill Property;

2. Sell the Oak Hill Property for cash or upon such terms as will be approved and confirmed by this court;

3. To pay any tax lien against the interest of Jerome Steinbrecher shall be from his allocable share;

4. All other liens against the Oak Hill Property, if any, shall be paid from the allocable share of the party incurring same;

5. To pay all costs of the receivership, including all costs of sale; and

6. To pay all remaining proceeds, after the payment of the expenses of the receiver and costs of court to the parties, as follows:

John Steinbrecher
one-third of the net proceeds
Jerome A. Steinbrecher
one-third of the net proceeds
Rosemary C. Steinbrecher
one-third of the net proceeds

IT IS FURTHER, ORDERED, that Plaintiff shall recover his costs of court from the proceeds of the sale of the Oak Hill Property.

IT IS FURTHER, ORDERED, that this receivership shall continue in effect until further order of this court.

Signed this JAN 8 2002 day of January, 2002.

/s/ Darlene Byrne
District Judge Presiding

(SEAL) THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711

(513) 463-1312

October 24, 2003

Rosemary C. Steinbrecher
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Newport Beach, CA 92663

Mr. Robert W. Swanson
VON KREISLER &
SWANSON, P.C.
610 West Lynn
Austin, TX 78703

Charles Grigson
604 W. 12th Street
Austin, TX 78701

Jerome Steinbrecher
Carling Hotel, Room 434
1512 N. LaSalle Drive
Chicago, IL 60810

RE: Case Number: 03-0791
Court of Appeals Number: 03-02-00681-CV
Trial Court Number: GN101701

Style: ROSEMARY C. STEINBRECHER
v.
JOHN STEINBRECHER

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

/s/ Andrew Weber
Andrew Weber, Clerk
by Nancy Vaga, Chief Deputy Clerk

cc: Ms. Angalia Rodriguez-Mendoza
Ms. Diane O'Neal

TEXAS RULES OF CIVIL PROCEDURE

SECTION 4. PARTITION OF REAL ESTATE

Rule 756. Petition

The plaintiff's petition shall state:

(a) The names and residence, if known, of each of the other joint owners, or joint claimants, of such property.

(b) The share or interest which the plaintiff and the other joint owners, or joint claimants, of same own or claim so far as known to the plaintiff.

(c) The land sought to be partitioned shall be so described as that the same may be distinguished from any other and the estimated value thereof stated.

Notes and Comments

Source

Art. 6083 (part), unchanged.

Rule 757. Citation and Service

Upon the filing of a petition for partition, the clerk shall issue citation for each of the joint owners, or joint claimants, named therein, as in other cases, and such citations shall be served in the manner and for the time provided for the service of citations in other leases.

Notes and Comments

Source

Art. 6084, unchanged.

Rule 758. Where Defendant is Unknown or Residence is Unknown

If the plaintiff, his agent or attorney, at the commencement of any suit, or during the progress thereof, for the partition of land, shall make affidavit that an undivided portion of the land described in plaintiff's petition in said suit is owned by some person unknown to affiant, or that the place of residence of any known party owning an interest in land sought to be partitioned is unknown to affiant, the Clerk of the Court shall issue citation for publication, conforming to the requirements of Rules 114 and 115, and served in accordance with the directions of Rule 116. In case of unknown residence or party, the affidavit shall include statement that after due diligence plaintiff and the affiant have been unable to ascertain the name or locate the residence of such party, as the case may be, and in such case it shall be the duty of the court trying the action to inquire into the sufficiency of the diligence so stated before granting any judgment. As amended by order of July 20, 1954, effective Jan. 1, 1955; Dec. 19, 1984, eff. April 1, 1985.

Notes and Comments

Source

Art. 6885.

Change: Elimination of specific declaration of requisites of citation by publication and service thereof and adoption (by reference) of the general rules.

Change by amendment effective January 1, 1955: Words "or that the place of residence of any known party owning an interest in the land sought to be partitioned is unknown to affiant." inserted in first sentence, and last sentence added.

Change by amendment effective April 1, 1985:

Comment: To delete reference to proviso in Rule 109 which proviso was previously deleted.

Rule 759. Judgment Where Defendant Cited by Publication

When the defendant has been duly cited by publication in accordance with the preceding rule, and no appearance is entered within the time prescribed for pleadings, the court shall appoint an attorney to defend in behalf of such owner or owners, and proceed as in other causes where service is made by publication. It shall be the special duty of the court in all cases to see that its decree protects the rights of the unknown parties thereto. The judge of the court shall fix the fee of the attorney so appointed, which shall be entered and collected as costs against said unknown owner or owners.

Notes and Comments

Source

Art. 6085, last two sentences, without material change.

Caveat: This article was amended in 1939, effective date being subsequent to the enactment of the Rule Making Statute. See, however, Garrett v. Mercantile National Bank of Dallas, § 40 Tex. 394, 168 S.W.2d 636.

Rule 760. Court Shall Determine, What

Upon the hearing of the cause, the court shall determine the share or interest of each of the joint owners or claimants in the real estate sought to be divided, and all questions of law or equity affecting the title to such land which may arise.

Notes and Comments

Source

Art. 6088, unchanged.

Rule 761. Appointment of Commissioners

The court shall determine before entering the decree of partition whether the property, or any part thereof, is susceptible of partition; and, if the court determines that the whole, or any part of such property is susceptible of partition, then the court for that part of such property held to be susceptible of partition shall enter a decree directing the partition of such real estate, describing the same, to be made in accordance with the respective shares or interests of each of such parties entitled thereto, specify in such decree the share or interest of each party, and shall appoint three or more competent and disinterested persons as commissioners to make such partition in accordance with such decree and the law, a majority of which commissioners may act.

Notes and Comments

Source

Art. 6087, unchanged.

Rule 762. Writ of Partition

The clerk shall issue a writ of partition directed to the sheriff or any constable of the county, commanding such sheriff or constable to notify each of the commissioners of their appointment as such, and shall accompany such writ with a certified copy of the decree of the court directing the partition.

Notes and Comments

Source

Art. 6088, unchanged.

Rule 763. Service of Writ of Partition

The writ of partition shall be served by reading the same to each of the persons named therein as commissioners, and by delivering to any one of them the accompanying certified copy of the decree of the court.

Notes and Comments

Source

Art. 6089, unchanged.

Rule 764. May Appoint Surveyor

The court may, should it be deemed necessary, appoint a surveyor to assist the commissioners in making the partition, in which case the writ of partition shall name such surveyor, and shall be served upon him by reading the same to him.

Notes and Comments

Source

Art. 6090, unchanged.

Rule 765. Return of Writ

A writ of partition, unless otherwise directed by the court, shall be made returnable twenty days from date of service on the commissioner last served; and the officer serving it shall endorse thereon the time and manner of such service.

Notes and Comments

Source

Art. 6091.

Rule 766. Shall Proceed To Partition

The commissioners, or a majority of them, shall proceed to partition the real estate described in the decree of the court, in accordance with the directions contained in such decree and with the provisions of law and these rules.

Notes and Comments

Source

Art. 6092, with minor textual change

Rule 767. May Cause Survey

If the commissioners deem it necessary, they may cause to be surveyed the real estate to be partitioned into several tracts or parcels.

Notes and Comments

Source

Art. 6098, unchanged.

Rule 768. Shall Divide Real Estate

The commissioners shall divide the real estate to be partitioned into as many shares as there are persons entitled thereto, as determined by the court, each share to contain one or more tracts or parcels, as the commissioners may think proper, having due regard in the division to the situation quantity and advantages of each share, so that the shares may be equal in value, as nearly as may be, in proportion to the respective interests of the parties entitled. The commissioners shall then proceed by lot to set apart to each of the parties entitled one of said shares, as determined by the decrees of the court.

Notes and Comments

Source

Art. 6094, unchanged.

Rule 769. Report of Commissioners

When the commissioners have completed the partition, they shall report the same in writing and under oath to the court, which report shall show:

(a) The property divided, describing the same.

(b) The several tracts or parcels into which the same was divided by them, describing each particularly.

(c) The number of shares and the land which constitutes each share, and the estimated value of each share.

(d) The allotment of each share.

(e) The report shall be accompanied by such field notes and maps as may be necessary to make the same intelligible.

The clerk shall immediately mail written notice of the filing of the report to all parties.

Amended by order of April 24, 1990, eff. Sept. 1, 1990.

Notes and Comments

Source

Art. 6095, unchanged.

Comment to 1990 change: Requirement added that clerk notify parties of the filing of the report.

Rule 770 Property Incapable of Division

Should the court be of the opinion that a fair and equitable division of the real estate, or any part thereof, cannot be made, it shall order a sale of so much as is incapable of partition, which sale shall be for cash, or upon such other terms as the court may direct, and shall be made as under execution or by private or public sale through a receiver, if the court so order, and the proceeds thereof shall be returned into court and be partitioned among the persons entitled thereto, according to their respective interests.

As amended by order of Oct. 12, 1949, effective March 1, 1950.

Notes and Comments

Source

Art. 6096, unchanged.

Rule 771. Objections to Report

Either party to the suit may file objections to any report of the commissioners in partition within thirty days of the date the report is filed, and in such case a trial of the issues thereon shall be had as in other cases. If the report be found to be erroneous in any material respect, or unequal and unjust, the same shall be rejected, and other commissioners shall be appointed by the Court, and the same proceedings had as in the first instance.

Amended by order of April 24, 1990, eff. Sept. 1, 1999.

Notes and Comments

Source

Art. 6097, unchanged.

Comment to 1990 change: To set a time within which objections to a commissioners report must be filed.

SECTION 6. PARTITION: MISCELLANEOUS PROVISIONS

Rule 776. Construction

No provision of the statutes or rules relating to partition shall affect the mode of proceeding prescribed by law for the partition of estates of decedents among the heirs and legatees, nor preclude partition in any other manner authorized by the rules of equity, which rules

shall govern in proceedings for partition in all respects not provided for by law or these rules.

Notes and Comments

Source

Art. 6106, which minor textual change.

Rule 777. Pleading and Practice

The same rules of pleading, practice and evidence which govern in other civil actions shall govern in suits for partition, when not in conflict with any provision is of the law or these rules relating to partition.

Notes and Comments

Source

Art. 6107, with minor textual change.

Rule 778. Costs

The court shall adjudge the costs in a partition suit to be paid by each party to whom a share has been allotted in proportion to the value of such share.

Notes and Comments

Source

Art. 6109, unchanged.

TEXAS PROPERTY CODE

CHAPTER 23. PARTITION

§ 23.001. Partition

A joint owner or claimant of real property or an interest in real property or a joint owner of personal property may compel a partition of the interest or the property among the joint owners or claimants under this chapter and the Texas Rules of Civil Procedure.

Acts 1983, 68th Leg., p. 3513, ch. 576, § 1, eff. Jan. 1, 1984.

§ 23.002. Venue and Jurisdiction

(a) A joint owner or a claimant of real property or an interest in real property may bring an action to partition the property or interest in a district court of a county in which any part of the property is located.

(b) A joint owner of personal property must bring an action to partition the property in a court that has jurisdiction over the value of the property.

Acts 1983, 68th Leg., p. 3513, ch. 576, § 1, eff. Jan. 1, 1984.

§ 23.003. Effect on Future Interests

A partition of real property involving an owner of a life estate or an estate for years and other owners of equal or greater estate does not prejudice the rights of an owner of a reversion or remainder interest.

Acts 1983, 68th Leg., p. 3513, ch. 576, § 1, eff. Jan. 1, 1984.

§ 23.004. Effect of Partition

(a) A person allotted a share of or an interest in real property in a partition action holds the property or interest in severalty under the conditions and covenants that applied to the property prior to the partition.

(b) A court decree confirming a report of commissioners in partition of real property gives a recipient of an interest in the property a title equivalent to a conveyance of the interest by a warranty deed from the other parties in the action.

(c) Except as provided by this chapter, a partition of real property does not affect a right in the property.

Acts 1983, 68th Leg., p. 3513, ch. 576, § 1, eff. Jan. 1, 1984.

§ 23.005. Fees

The judge of a court that hears an action to partition real property shall examine the report of the commissioners appointed to partition the property and shall determine from the report and from evidence submitted by the parties the complexity and difficulty of making the partition. The court shall then award the commissioners, and any surveyor appointed by the court or retained by the commissioners, a reasonable fee for the services rendered. The fees awarded shall be taxed and collected as costs of court in the same manner as the other costs in the action.

Acts 1983, 68th Leg., p. 3514, ch. 576, § 1, eff. Jan 1, 1984. Amended by Acts 1991, 72nd Leg., ch. 443, § 1, eff. Sept. 1, 1991.

ILLINOIS CODE OF CIVIL PROCEDURE

735 ILCS 5/17-101. Compelling partition

§ 17-101. Compelling partition. When lands, tenements, or hereditaments are held in joint tenancy or tenancy in common, whether such right or title is derived by purchase, legacy or descent, or whether any or all of the claimants are minors or adults, any one or more of the persons interested therein may compel a partition thereof by a verified complaint in the circuit court of the county where the premises or part of the premises are situated. If lands, tenements or hereditaments held in joint tenancy or tenancy in common are situated in 2 or more counties, the venue may be in any one of such counties, and the circuit court of any such county first acquiring jurisdiction shall retain sole and exclusive jurisdiction. Ownership of an interest in the surface of lands, tenements, or hereditaments by a co-owner of an interest in minerals underlying the surface does not prevent partition of the mineral estate. This amendatory Act of the 92nd General Assembly is a declaration of existing law and is intended to remove any possible conflicts or ambiguities, thereby confirming existing law pertinent to the partition of interests in minerals and applies to all actions for the partition of minerals now pending or filed on or after the effective date of this amendatory Act of the 92nd General Assembly. Nothing in this amendatory Act of the 92nd General Assembly shall be construed as allowing an owner of a mineral interest in coal to mine and remove the coal by the surface method of mining without first obtaining the consent of all of the owners of the surface to the mining and removal of coal by the surface method of mining.

P.A. 82-280, § 17-101, eff. July 1, 1982. Amended by P.A. 92-379, § 5, eff. Aug. 16, 2001.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-101.

17-102. Complaint

§ 17-102. Complaint. The verified complaint shall particularly describe the premises sought to be divided, and shall set forth the interests of all parties interested therein, so far as the same are known to the plaintiffs, including tenants for years or for life, and of all persons entitled to the reversion, remainder or inheritance, and of every person who, upon any contingency, may be or become entitled to any beneficial interest in the premises, so far as the same are known to the plaintiffs, and shall ask for the division and partition of the premises according to the respective rights of the parties interested therein, or, if a division and partition of the same cannot be made without manifest prejudice to the owners, that a sale thereof be made and the proceeds divided according to the respective rights of the parties.

P.A. 82-280, § 17-102, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-102.

5/17-103. Parties defendant

§ 17-103. Parties defendant. Every person having any interest, whether in possession or otherwise, who is not a plaintiff shall be made a defendant in such complaint.

P.A. 82-280, § 17-103, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-103.

5/17-104. Unknown parties

§ 17-104. Unknown parties. When there are any persons interested in the premises whose names are unknown, or the share or quantity of interest of any of the parties is unknown to the plaintiff, or such share or interest is uncertain or contingent, or the ownership of the inheritance depends upon an executory devise, or the remainder is contingent, so that such parties cannot be named, it shall be so stated in the verified complaint.

P.A. 82-280, § 17-104, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-104.

5/17-105. Judgment

§ 17-105. Judgment. The court shall ascertain and declare the rights, titles and interest of all the parties in such action, the plaintiffs as well as the defendants, and shall enter judgment according to the rights of the parties.

P.A. 82-280, § 17-105, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-105.

5/17-106. Appointment of Commissioners

§ 17-106. Appointment of Commissioners. When the court orders a partition of any premises to be made, it shall appoint 3 commissioners, not connected with any of the parties, either by consanguinity or affinity, and entirely disinterested, to make partition of the premises, and

such commissioners shall be allowed a reasonable sum for their services and expenses, to be fixed by the court, and taxed in the bill of costs.

The Court may in its discretion appoint one commissioner who shall have all the rights and powers and be under the same obligations as set forth in Article XVII of this Act whenever 3 commissioners are appointed.

P.A. 82-280, § 17-106, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-106.

5/17-107. Oath of Commissioners

§ 17-107. Oath of Commissioners. Each commissioner shall take and subscribe an oath or affirmation fairly and impartially to make partition of the premises, according to the rights and interests of the parties, as declared by the judgment of the court, if the same can be done consistently with the interests of the parties; or, if the same cannot be so divided without manifest prejudice to the parties in interest, that they will fairly and impartially appraise the value of each piece or parcel of the premises sought to be divided, and make a true report to the court.

P.A. 82-280, § 17-107, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-107.

5/17-108. Duty of Commissioners

§ 17-108. Duty of Commissioners. The commissioners shall enter upon the premises and, if the same are susceptible of division without manifest prejudice to the rights of the parties, they shall make partition thereof,

allotting the several shares to the respective parties, quality and quantity relatively considered, according to their respective rights and interests as adjudged by the court, designating the respective shares by metes and bounds or other proper description, and they may employ a surveyor with necessary assistants to aid therein. If the premises are not susceptible of division without manifest prejudice to the parties in interest, the commissioners shall value each piece or parcel separately.

P.A. 82-280, § 17-108, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-108.

5/17-109. Report of Commissioners

§ 17-109. Report of Commissioners. The commissioners shall report to the court, in writing, signed by at least 2 of them, showing what they have done, and if they have made a division, describing the premises divided and the shares of each party by metes and bounds or other proper description; or if they find that the lands cannot be divided, they shall so report, and shall state their valuation of each piece or tract separately.

P.A. 82-280, § 17-109, eff. July 1, 1982. Amended by P.A. 83-707, § 1, eff. Sept. 23, 1983.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-109.

5/17-110. Control and removal of Commissioners

§ 17-110. Control and removal of Commissioners. The commissioners shall at all times be subject to the direction of the court; and any one or more of them may,

before the final confirmation of the report, be removed, and others appointed in their stead.

P.A. 82-280, § 17-110, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-110.

5/17-111. Land in different counties

§ 17-111. Land in different counties. If the lands lie in different counties, the court may appoint separate sets of commissioners for each county, or one set for all of them, as may seem most beneficial to the parties interested.

P.A. 82-280, § 17-111, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-111.

5/17-112. Homestead

§ 17-112. Homestead. If any party to the action is entitled to an estate of homestead in the premises, or any part thereof, and the homestead has not been set off, the homestead may be set off by the commissioners; and if the court so directs, the premises so allotted or set off may be partitioned among the claimants, subject thereto.

P.A. 82-280, § 17-112, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-112.

5/17-113. Election as to shares

§ 17-113. Election as to shares. Several parties interested in the premises may, if they so elect, have their shares set off together or in severalty.

P.A. 82-280, § 17-113, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-113.

5/17-114. Liens

§ 17-114. Liens. A person having a mortgage, attachment, or other lien on the share of a part owner shall be concluded by the judgment of partition so far as it relates to the partition and the assignment of the shares, but his or her lien shall remain in full force upon the part assigned to or left for such part owner.

P.A. 82-280, § 17-114, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-114.

5/17-115. Eviction by person with better title

§ 17-115. Eviction by person with better title. If a person to whom any share has been allotted is evicted by a person who, at the time of the partition, had a title older and better than the title of those who were parties to the action, the person evicted may have a new partition of the residue as if no partition had been made, if such new partition can be justly made, or he or she may have contribution from the others, so as to make his or her share just and proportional with the others, according to the rights in the premises.

P.A. 82-280, § 17-115, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-115.

5/17-116. Sale of premises not susceptible to division

§ 17-116. Sale of premises not susceptible to division. When the whole or any of the premises sought to be partitioned cannot be divided without manifest prejudice to the owners thereof, and the commissioners appointed to divide the same so report, the court shall order the premises not susceptible of division to be sold at public sale, upon such terms and notice of sale as the court directs.

P.A. 82-280, § 17-116, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-116.

5/17-117. Valuation of premises

§ 17-117. Valuation of premises. No piece or parcel of the premises shall be sold, if it will not bring at least 2/3 as much as it has been valued by the commissioners, unless the other pieces will, at the same time, sell for enough to make the total amount of the sales equal to 2/3 the total amount of the valuation of all premises to be sold. If it appears to the court that any of the premises will not sell for 2/3 of the amount of the valuation thereof, the court may appoint other commissioners to re-value such premises, and their valuation shall be taken instead of the valuation of the commissioners first appointed.

P.A. 82-280, § 17-117, eff. July 1, 1982. Amended by P.A. 83-707, § 1, eff. Sept. 23, 1983.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-117.

5/17-118. Report of sale – Conveyances

§ 17-118. Report of sale – Conveyances. The officer making such sale shall, within 10 days thereafter, file a report of his or her action in the office of the clerk of the court ordering such sale. The court may approve the report and confirm the sale reported if no objections have been filed or may disapprove the sale and order the real estate to be resold; if objections have been filed to the report, the court may at once proceed to hear such objections and sustain or overrule them.

Upon confirmation of the sale, the person making the sale or some person specially appointed shall execute and deliver to the purchaser proper conveyances, taking in case of sale on credit, security as required by the judgment. These conveyances shall operate as an effectual bar against all parties and privies to the proceedings and all persons claiming under them.

P.A. 82-280, § 17-118, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-118.

5/17-119. Distribution of proceeds

§ 17-119. Distribution of proceeds. Upon the approval of the report by the court, the proceeds of the sale shall be distributed by the person making the sale, as directed by the court, to the persons entitled thereto, according to their interests, or, in appropriate cases, to the persons and in the amounts and manner as now or

hereafter provided in the applicable sections of the Probate Act of 1975, as amended,[1] relating to small estates.

P.A. 82-280, § 17-119, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-119.

5/17-120. Life estate or homestead

§ 17-120. Life estate or homestead. In case of sale the court may, with the consent of the person entitled to an estate for life, or for years, or of homestead, to the whole or any part of the premises, who is a party in the action, sell such estate with the rest. Such consent shall be in writing, signed by such person, and filed in the court wherein the proceedings for partition are pending.

If such persons are incapable of giving consent, the court may determine, taking into consideration the interests of all parties, whether such estate ought to be excluded from the sale or sold.

When such interest is sold, the value thereof may be ascertained and paid over in gross, or the proper proportion of the funds invested, and the income paid over to the party entitled thereto, during the continuance of the estate.

P.A. 82-280, § 17-120, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-120.

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[1] 755 ILCS 5/1-1 et seq.

5/17-121. Unknown owners

§ 17-121. Unknown owners. If the person entitled to any estate is unknown, the court may determine whether the estate shall be sold or not, as in case of persons under disability, and in the event of sale, make such order for the protection of the rights of such person, in the same manner, as far as may be, as if the person were known and had appeared.

P.A. 82-280, § 17-121, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-121.

5/17-122. Deposit of proceeds of sale

§ 17-122. Deposit of proceeds of sale. When a sale of premises is made, and no person appears to claim such portion of the money as may belong to any non- resident or person whose name is unknown, the court shall require such money to be deposited in the county treasury, subject to the further order of the court. All money so required to be deposited shall be received by the county treasurer and paid upon the order of the court.

P.A. 82-280, § 17-122, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-122.

5/17-123. Application for deposited money

§ 17-123. Application for deposited money. When money is so deposited in the county treasury, the person or persons entitled to the same, may at any time apply to the court making the order of sale and obtain an order for the

same upon making satisfactory proof to the court of his or her right thereto.

P.A. 82-280, § 17-123, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-123.

5/17-124. Vesting title

§ 17-124. Vesting title. In all actions for the partition of real estate, the court may: investigate and determine all questions of conflicting or controverted titles, and remove clouds upon the titles to any of the premises sought to be partitioned; vest titles, by its order, in the parties to whom the premises are allotted, without the forms of conveyances by minors or unknown heirs or other parties to the action; order a sale of the premises for the purpose of dividing the premises in proper cases, and by its order, vest the purchaser with title, and apportion incumbrances among the parties to whom the incumbered premises are allotted.

P.A. 82-280, § 17-124, eff. July 1, 1982. Amended by P.A. 84-1308, Art. III, § 46, eff. Aug. 25, 1986.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-124.

5/17-125. Costs

§ 17-125. Costs. In all proceedings for the partition of real estate, when the rights and interests of all the parties in interest are properly set forth in the complaint, the court shall apportion the costs among the parties in interest in the action, including the necessary expense of procuring such evidence of title to the real estate as is usual and customary for making sales of real estate, and a

reasonable fee for plaintiff's attorney, so that each party shall pay his or her equitable portion thereof, unless the defendants, or some of them, interpose a good and substantial defense to the complaint. In such case the party or parties making such substantial defense shall recover their costs against the plaintiff according to justice and equity.

P.A. 82-280, § 17-125, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-125.

5/17-126. Adjustment of rights after judgment

§ 17-126. Adjustment of rights after judgment. In any case where, after judgment of partition, and before division or sale is had (as the case may be), the parties in interest adjust the respective rights among themselves so that further proceedings leading to such actual division or sale become unnecessary, an order shall be entered terminating further proceedings, whereupon the judgment of partition shall remain in full force and effect to determine the rights and interests of the parties as adjudicated therein, and there shall be no judicial division or sale of the premises, rights or interests pursuant to such judgment.

P.A. 82-280, § 17-126, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-126.

5/17-127. Proceedings herein

§ 17-127. Proceedings herein. Proceedings for partition shall be conducted in accordance with the provisions of Article XVII of this Act.

P.A. 82-280, § 17-127, eff. July 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 110, ¶ 17-127.

ILLINOIS SUPREME COURT RULES

Rule 303. Appeals from Final Judgments of the Circuit Court in Civil Cases

(a) Time; Filing; Transmission of Copy.

(1) Except as provided in paragraph (b) below, the notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from, or, if a timely post-trial motion directed against the judgment is filed, whether in a jury or a nonjury case, within 30 days after the entry of the order disposing of the last pending post-judgment motion.

(2) When a timely post-judgment motion has been filed by any party whether in a jury case or a nonjury case, a notice of appeal filed before the entry of the order disposing of the last pending post-judgment motion shall have no effect and shall be withdrawn by the party who filed it, by moving for dismissal pursuant to Rule 309. This is so whether the timely post-judgment motion was filed before or after the date on which the notice of appeal was filed: A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the post-judgment motion, as provided in subparagraph (a)(1) of this rule. No request for reconsideration of a ruling on a post-judgment motion will toll the running of the time within which a notice of appeal must be filed under this rule. A party who filed a premature notice of appeal will not be required to pay a filing fee for a future appeal in the same case if, at the time of filing the future appeal, the party presents the receipt for the fee paid for filing the premature notice of appeal and a copy of the circuit court order dismissing the premature appeal.

(3) If a timely notice of appeal is filed and served by a party, any other party, within 10 days after service upon him or her, or within 30 days from the entry of the judgment or order being appealed, or within 30 days of the entry of the order disposing of the last pending post-judgment motion, whichever is later, may join in the appeal, appeal separately, or cross-appeal by filing a notice of appeal, indicating which type of appeal is being taken.

(4) Within five days after the filing of a notice of appeal, or an amendment of a notice of appeal filed in the circuit court pursuant to subparagraph (c)(4) of this rule, the clerk of the circuit court shall transmit to the clerk of the court to which the appeal is being taken a copy of the notice of appeal or of the amendment.

(b) Form and Contents of Notice of Appeal.

(1) The notice of appeal shall be captioned as follows:

(i) At the top shall appear the statement "Appeal to the ___ Court," naming the court to which the appeal is taken, and below this shall be the statement "From the Circuit Court of ___" naming the court from which the appeal is taken.

(ii) It shall bear the title of the case, naming and designating the parties in the same manner as in the circuit court and adding the further designation "appellant" or "appellee," e.g., "Plaintiff-Appellee."

(iii) It shall be designated "Notice of Appeal," "Joining Prior Appeal," "Separate Appeal," or "Cross-Appeal," as appropriate.

(2) It shall specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court.

(3) It shall contain the signature and address of each appellant or appellant's attorney.

(4) The notice of appeal may be amended without leave of court within the original 30-day period to file the notice as set forth in paragraph (a) above. Thereafter it may be amended only on motion, in the reviewing court, pursuant to paragraph (d) of this rule. Amendments relate back to the time of the filing of the notice of appeal.

(c) Service of Notice of Appeal. The party filing the notice of appeal or an amendment as of right, shall, within 7 days, file a notice of filing with the reviewing court and serve a copy of the notice of appeal upon every other party and upon any other person or officer entitled by law to notice. Proof of service, as provided by Rule 12, shall be filed with the notice.

(d) Extension of Time in Certain Circumstances. On motion supported by a showing of reasonable excuse for failure to file a notice of appeal on time, accompanied by the proposed notice of appeal and the filing fee, filed in the reviewing court within 30 days after expiration of the time for filing a notice of appeal, the reviewing court may grant leave to appeal and order the clerk to transmit the notice of appeal to the trial court for filing.

(e) Docketing. Upon receipt of the copy of the notice of appeal transmitted to the reviewing court pursuant to paragraph (a) of this rule, or receipt of a motion for leave to appeal under paragraph (d) of this rule, the clerk

of the reviewing court shall enter the appeal upon the docket.

Amended eff. Jan. 12, 1967; amended eff. Jan. 1, 1970; July 1, 1971; amended June 28, 1974, eff. Sept. 1, 1974; Sept. 28, 1976, eff. Nov. 15, 1976; July 30, 1979, eff. Oct. 15, 1979; Aug. 9, 1983, eff. Oct. 1, 1983; April 27, 1984, eff. July 1, 1984; Dec. 17, 1993, eff. Feb. 1, 1994.

Formerly Ill.Rev.Stat.1991, ch. 110A, ¶ 303.

Rule 305. Stay of Judgments Pending Appeal

(a) Stay of Enforcement of Money Judgments. The enforcement of a judgment for money only, or any portion of a judgment which is for money, is stayed only if a timely notice of appeal is filed and an appeal bond is presented, approved, and filed within the time for filing the notice of appeal or within any extension of time granted under paragraph (c) of this rule. Notice of the presentment of the bond shall be given to the appellee. The bond shall be in an amount sufficient to cover the amount of the judgment, interest and costs.

(b) Other Stays of Enforcements of Judgments and Appealable Orders. On notice and motion, and an opportunity for opposing parties to be heard, the court may stay the enforcement of any judgment, or the enforcement, force and effect of interlocutory orders or any other judicial or administrative order. The stay shall be conditioned upon such terms as are just. A bond may be required in any case, and shall be required in money judgments or to protect an appellee's interest in property.

(c) Extensions of Time. On motion made within the time for filing the notice of appeal or within any extension granted pursuant to this paragraph, the time for the filing and approval of the bond may be extended by the trial court or by the reviewing court or a judge thereof, but the extensions of time granted by the trial court may not aggregate more than 45 days unless the parties stipulate otherwise. A motion in the reviewing court for any extension of time for the filing and approval of the bond in the trial court must be supported by affidavit and accompanied by a supporting record (Rule 328), if the record on appeal has not been filed.

(d) Stays by the Reviewing Court. Application for a stay ordinarily must be made in the first instance to the trial court. A motion for a stay may be made to the reviewing court, or to a judge thereof, but such a motion must show that application to the trial court is not practical, or that the trial court has denied an application or has failed to afford the relief that the applicant has requested, and must be accompanied by suggestions in support of the motion and a supporting record (Rule 328), if the record on appeal has not been filed. If a stay is granted by the reviewing court or a judge thereof, the clerk shall notify the parties and transmit to the clerk of the trial court or administrative agency a certified copy of the order granting the stay.

(e) When Notice of Appeal Is Amended. If a notice of appeal is amended to specify parts of the judgment not specified in the original notice of appeal, the stay of the judgment described in the original notice of appeal does not extend to any added part of the judgment, but a stay of the added part may be obtained under the same conditions and by the same procedure set forth above.

(f) Condition of the Bond. If an appeal is from a judgment for money, the condition of the bond shall be for the prosecution of the appeal and the payment of the judgment, interest, and costs in case the judgment is affirmed or the appeal dismissed, except that the bond of an executor or administrator shall be conditioned upon payment in due course of administration and that the bond of a guardian for a minor or a person under legal disability shall be conditioned on payment as the guardian has funds therefor. In all other cases, the condition shall be fixed with reference to the character of the judgment.

(g) Changing the Amount, Terms, and Security of the Bond After the Appeal is Docketed. After the case is docketed in the reviewing court, that court or a judge thereof upon motion may change the amount, terms or security of the bond, whether fixed by it or by the trial court, and failure to comply with the order of the reviewing court or judge shall terminate the stay.

(h) Appeals by Public Agencies. If an appeal is prosecuted by a public, municipal, governmental, or quasi-municipal corporation, or by a public officer in that person's official capacity for the benefit of the public, the trial court, or the reviewing court or a judge thereof, may stay the judgment pending appeal without requiring tha, any bond be given.

(i) Insurance Policy as Bond. The filing of an insurance policy pursuant to section 392.1 of the Illinois Insurance Code (215 ILCS 5/392.1 (West 1992) shall be considered the filing of a bond for purposes of this rule.

(j) Failure to Obtain Stay; Effect on Interests in Property. If a stay is not perfected within the time for filing the notice of appeal, or within any extension of time

granted under subparagraph (c) of this rule, the reversal or modification of the judgment does not affect the right, title, or interest of any person who is not a party to the action in or to any real or personal property that is acquired after the judgment becomes final and before the judgment is stayed, nor shall the reversal or modification affect any right of any person who is not a party to the action under or by virtue of any certificate of sale issued pursuant to a sale based on the judgment and before the judgment is stayed. This paragraph applies even if the appellant is a minor or a person under legal disability or under duress at the time the judgment becomes final.

(k) Land Trust Bond. The filing of a bond by a beneficiary under a land trust where the land trust is a party shall be considered filing of a bond for purposes of this rule.

Amended Oct. 21, 1969, eff. Jan. 1, 1970; amended eff. July 1, 1971; amended Sept. 20, 1979, eff. Oct. 15, 1979; Jan. 5, 1981, eff. Feb. 1, 1981; May 28, 1982, eff. July 1, 1982; Dec. 17, 1993, eff. Feb. 1, 1994.

Formerly Ill.Rev.Stat.1991, ch. 110A, ¶ 305.

CITATION

THE STATE OF TEXAS

Cause No.
GN101701

JOHN STEINBRECHER, Plaintiff

vs.

JEROME A. STEINBRECHER AND, Defendant
ROSEMARY C. STEINBRECHER

To: JEROME A. STEINBRECHER "CERT. MAIL"
CARLING HOTEL, No RM #434
1512 LASALLE
CHICAGO, IL 60610

JUN 7 - 2001
MAILED THIS ___ DAY OF ___
BRUCE ELFANT
CONSTABLE, PRECINCT 5, TRAVIS COUNTY, TEXAS
/s/ [ILLEGIBLE]
DEPUTY

Defendant, in the above styled and numbered cause:

YOU HAVE BEEN SUED. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 A. M. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you.

Attached is a copy of the ORIGINAL PETITION of the PLAINTIFF in the above styled and numbered cause, which was filed on the 4th day of June, 2001, in the 200th Judicial District Court of Travis County, Austin, Texas.

ISSUED AND GIVEN UNDER MY HAND AND SEAL of said Court at office, this the 5th day of June, 2001.

REQUESTED BY:

ROBERT W. SWANSON

515 CONGRESS AVENUE, 1000 CAPITOL CTR

AUSTIN, TX 76701

(512) 472-1494

Amalia Rodriguez-Mendoza

Travis County District Clerk

Travis County Courthouse

1000 Guadalupe, Box 1748

Austin, Texas

By ___

LACONIA JEFFERSON, Deputy

- - - - - - - - - - - - - - - - - RETURN - - - - - - - - - - - - - - - - - -

Come to hand on the ___ day of ___ at ___ o'clock ___.M., and executed at ___ within the County of ___ on the ___ day of ___ at ___ o'clock ___.M., by delivering to the within named _____

_____

with the accompanying pleading, having first attached such copy of such citation to such copy of pleading and endorsed on such copy of citation the date of delivery.

Service Fee: $ _____

Sworn to and subscribed before me this the ___ day of ___, ___.

_____

NOTARY PUBLIC, THE STATE OF TEXAS

Service Copy

Constable Precinct 5

BRUCE ELFANT

CONSTABLE, PRECINCT 5, TRAVIS COUNTY, TEXAS

SHERIFF/CONSTABLE/AUTHORIZED PERSON

BY: _____

_____

PRINTED NAME OF SERVOR

_____ County, Texas

CAUSE NO. GN101701

JOHN STEINBRECHER, Plaintiff, VS. JEROME A. STEINBRECHER and ROSEMARY C. STEINBRECHER, Defendants.	§ § § § § § § § §	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 200TH JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW JOHN STEINBRECHER, Plaintiff, complaining of JEROME A. STEINBRECHER AND ROSEMARY C. STEINBRECHER, Defendants, and for cause of action would respectfully show as follows:

I. Discovery Plan

1. Discovery is intended to be conducted under Level 2 of Texas Rule of Civil Procedure 190.

II. Parties

2. Plaintiff is John Steinbrecher, an individual residing in Austin, Travis County, Texas.

3. Defendant Jerome A. Steinbrecher is an individual residing at Carling Hotel, Room 434, 1512 LaSalle, Chicago, IL 60610 and he may be served with process at such address.

4. Defendant Rosemary C. Steinbrecher is an individual residing at 10 East Ontario #3307, Chicago, Il. 60611 and she may be served with process at such address.

III. Jurisdiction and Venue

5. This suit seeks to partition real property in Travis County, Texas and jurisdiction is proper in this court under Tex. Prop. Code §23.002.

6. Venue is proper in this court under Tex. Civ. Prac. and Rem. Code §15.011 and Tex. Prop. Code §23.002.

IV. Facts

7. Plaintiff and Defendants are brothers and sister and are the sole heirs of their father, Frances J. Steinbrecher, Sr., deceased. A copy of an order declaring heirship was entered in the Circuit Court of Cook County, Illinois, County Department, Probate Division, on March 6, 1991, a copy of which is attached hereto as Exhibit A.

8. At the time of his death, Frances J. Steinbrecher, Sr. owned 13.885 acres out of the T. Anderson Abstract No. 28, Survey 93, Travis County, Texas (the "Oak Hill Property"), more specifically described on Exhibit B attached hereto. The Oak Hill Property is unimproved.

9. As heirs of Frances J. Steinbrecher, Sr., the parties hereto are now the owners of the Oak Hill Property, as follows:

John Steinbrecher
one-third undivided interest
Jerome A. Steinbrecher
one-third undivided interest
Rosemary C. Steinbrecher
one-third undivided interest

10. As more fully set forth below, John Steinbrecher requests that the property be partitioned. However, a fair

and equitable division of the real estate cannot be made and it is incapable of partition. The property has little road frontage (approximately 380 feet) and is extremely deep (over 1700 feet). There is no practicable way to divide the property into 3 parcels without destroying the overall value of the tract.

11. Upon information and belief, the interest of Jerome A. Steinbrecher is encumbered with a federal tax liens [sic] filed in Vol. 654, page 135 and 654, page 138 of the Federal Tax Lien Record, Travis County, Texas.

V. Cause of Action – Partition by Sale

12. The allegations in paragraphs 1 through 11 above are incorporated herein by reference.

13. Plaintiff is entitled to have the property partitioned pursuant to Rules of Civil Procedure 756, et seq. and Tex. Prop. Code Section 23.001, et seq. Because a fair and equitable division of the property cannot be made, the property should be sold pursuant to an order of the court for cash under execution or by a private or public sale through a receiver. The proceeds should be partitioned among the parties, subject to the tax liens, if any, of Jerome A. Steinbrecher being satisfied out of his proceeds of the sale.

14. Alternatively, if the court believes the property can be partitioned in kind, the property should be partitioned in kind pursuant to the Rules of Civil Procedure.

WHEREFORE, Plaintiff respectfully prays that upon trial hereof, that the court find that the Oak Hill Property is owned by John Steinbrecher, Jerome A. Steinbrecher and Rosemary C. Steinbrecher as tenants in common in

equal one-third shares and that a fair and equitable division of the property cannot be made. Plaintiff further

PRAYS that the court order the Oak Hill Property sold at public or private sale though [sic] a receiver to be appointed by the court, subject to confirmation by this court or, alternatively, that the Oak Hill Property be sold under execution. Plaintiff further

PRAYS that the receiver be authorized to pay all expenses of sale and all lien claims against the property and that any tax lien against the interest of Jerome Steinbrecher be paid from his allocable share. Plaintiff further

PRAYS that the proceeds of the sale after payment of expenses and lien claims be disbursed to the parties hereto with one-third being paid to each party with the allocable share of Jerome Steinbrecher being subject to the payment of his federal tax lien if any. Plaintiff further

PRAYS that he recover his cost of suit and such other and further relief as is just.

Respectfully submitted,

VON KREISLER & SWANSON, P.C.
610 West Lynn
Austin, Texas 78703
(512) 472-1494 Fax: (512) 478-4936

By: /s/ Robert M. Swanson
Robert M. Swanson
SBN 19555550

EXHIBIT A

ORDER DECLARING HEIRSHIP (Rev. 6-89) CCP-305

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, PROBATE DIVISION

Estate of Francis J. Steinbrecher Deceased	}	No. 91 P 000840 Docket 979 Page 339

ORDER DECLARING HEIRSHIP

After considering evidence concerning heirship, the court declares that the following are the only heirs of the decedent:

John Steinbrecher, son;
Jerome A. Steinbrecher, son; and
Rosemary Catherine Steinbrecher, daughter.

3-6-91, 19___

ENTER:

/s/ Judge F. Syracusa 51917
Judge Judge's No.

Atty Name David S. Crossett
Firm Name Chapman and Cutler
Atty for Petitioner
Address 111 West Monroe Street
City & Zip Chicago, Illinois 60603
Telephone (312) 845-3011
Atty No. 90170

AURELLA PUCINSKI, CLERK OF THE
CIRCUIT COURT OF COOK COUNTY

EXHIBIT B

* * *

SCHEDULE A – continued

Commitment No. 60200037 GF No. 00200037

3. Record Title to the land on the Effective Date appears to be vested in:

   Francis J. Steinbrecher, Sr.

4. Legal description of land:

   TRACT 1: Being all that certain tract or parcel of land containing 10.70 acres, more or less, situated in the Thomas Anderson Survey No. 90 and the Thomas W. Moore Survey No. 526, Travis County, Texas, said tract being more particularly described by metes and bounds shown on Exhibit "A" attached hereto and made a part hereof.

   TRACT 2: Being all of that certain tract or parcel of land containing 3.185 acres, more or less, situated in the Thomas Anderson Survey No. 90 and the Thomas W. Moore Survey No. 526, Travis County, Texas, said tract being more particularly described by metes and bounds shown on Exhibit "B" attached hereto and made a part hereof.

   NOTE: The Company does not represent that the above acreage or square footage calculations are correct.

APPELLATE CAUSE NO. 03-02-00681-CV
IN THE APPELLATE COURT OF THE STATE OF TEXAS
THE THIRD DISTRICT COURT OF APPEALS

JOHN STEINBRECHER, Plaintiff/Appellee	) Accelerated
	) Interlocutory Appeal
	) TC No. GN 1-01701
v.	) (Partition Action)
JEROME A. STEINBRECHER,	) from order of 9/23/02
Defendant and ROSEMARY C.	) Judge Paul Davis
STEINBRECHER	)
Defendant/Appellant	)

APPELLANT'S BRIEF

/s/ Rosemary C. Steinbrecher
Appellant
Rosemary C. Steinbrecher
acting *pro se*
100 Scholz Plaza, #112
Newport Beach, CA 92663
phone and fax 949-548-4542

* * *

(e) ISSUES PRESENTED

1. Does the trial court assume jurisdiction over a case from a party's failure to answer, when even if every answer had been in the affirmative, jurisdiction would not be clear or gained at all?

2. Before a default judgment is properly rendered, the record must reflect that the trial court has jurisdiction and that the case is ripe for judgment.

3. Can a court state it has "found" in a partition action in obvious or probable violation of the facts presented or not supported by any facts?

4. An ultimate result of a judicial sale based on this case as it now stands will be chilled and stifled bidding.

(f) STATEMENT OF FACTS

1. The complaint is not verified; not fatal, but its importance will be noted later.

2. There never was a Texas probate.

3. There was no proof of ownership of the subject property whatsoever supplied to court at any time; no deed, no provenance.

4. The only support for plaintiff's statements of ownership in the complaint is a singe [sic] sheet entitled, "Order of Heirship" from the Cook County, Illinois probate court.

5. There was no statement of any kind by plaintiff that the title is clear to the property. Our deceased father never owned the property free of title incumbrances, and no one is [sic] court was prepared to state that title is clear. There is case law forbidding a Texas partition court from addressing issues of title.

6. Plaintiff included a legal description and a statement in his complaint that this 13.885 acres was indivisible without destroying the overall value of the tract. No other proof of this was ever given to the court, in apparent violation of existing case law requiring such proof to be part of the record before property can be sold in partition in Texas.

7. Judge John Dietz cited as his precedent for denying Rosemary's motion to vacate interlocutory default a case which had nothing to do with jurisdictional problems

and an invlid [sic] default judgment (nor interlocutory default).

* * *

(h) ARGUMENT

It has been held in Texas (*Finlay v. Jones*, 435 S.W.2d 136, 138 (Tex.1968)) and regularly affirmed (*Uvere v. Canales* (Tex App Dallas) S.W.2d 741 and *Nueces County Housing Assistance, Inc. v. M & M Resources Corp.* (Tex App Corpus Christi) 806 S.W.2d 948, writ den (Sep 25, 1991)) that:

> "Before a default judgment is properly rendered, the record must reflect that the trial court has jurisdiction and that the case is ripe for judgment."

Black's Law Dictionary (7th Edition) defines "jurisdiction," in part, as: "2. A court's power to decide a case or issue a decree." Further, it defines "ripeness" (in full) as:

> "1. The circumstances existing when a case has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made.
> 2. The requirement that this circumstance must exist before a court will decide a controversy."

The problem with the interlocutory default judgment in this case is that neither of these criteria had been met. Therefore the order is void. The record did not at the time of the judgment, nor subsequently when motions to reconsider were denied or overruled, give jurisdiction to the

court or ripeness to the case to accomplish a valid sale of the subject property, or even partition in kind.

The complaint and record are simply insufficient to support Judge Byrne's interlocutory default judgment. And because the "trial" was merely a verification from the record that service had been completed the required number of days previous, no new evidence was placed in the record, which would have justified the order, obviously pre-prepared by plaintiff for Judge Byrne's signature. (See App. (3)(5) for Judge Byrne's court reporter's statement that no transcript was taken of the January 8, 2002 transpirings.

An "Order Declaring Heirship," signed by an Illinois probate judge (CR, p.5), was the only proof or evidence available to Judge Byrne, other than a legal description of the subject property (CR, p.6-8). And the legal description specifically states (CR, p.6):

> "Record title on the effective date appears to be vested in Francis J. Steinbrecher, Sr."

Not the name of the three siblings, nowhere mentioned, just the name of the (deceased) father.

Generally, questions as to title may not be determined in a proceeding to compel a partitioning of land. (*De La Vega v. League* (1885) 64 Tex 205) Although a partition suit in the ordinary form may be converted into a suit of trespass to try title, "the defendant must allege must allege [sic] title and right of possession to all of the land in controversy." (*Green v Churchwell* (1920, Tex Civ App) 222 SW 341) But the plaintiff only very obliquely alleges either title or right of possession.

1. Record title "appears to be vested in" the deceased father; not is, but only "appears to be."

2. Plaintiff never gives any connection between Illinois and Texas probate or inheritance law.

3. Plaintiff's legal description with the above quote does not give the "effective date."

Further, Texas law requires some proof of indivisibility to be present in the record before a partition court may validly sell property. *Robertson v Robertson*, (1968, Tex Civ App Houston (14th District)) 425 SW2nd 707 states:

> "Where the record contains no evidence as to whether the property was susceptible of division in kind, a judgment directing sale and division of the proceeds should be reversed and remanded."

Thus the two requirements for a valid default judgment (of which interlocutory default judgment is the necessary prerequisite); jurisdiction and ripeness, are not present. Jurisdiction is definitely "iffy," and ripeness is definitely absent.

The fact that the complaint was unverified, while certainly not fatal under Texas law, might also indicate the need for caution where property is to be seized and sold, especially perhaps where not in satisfaction of a debt. The defaulted parties do not lose their rights to the property or their share of the proceeds. But there is also the rights of both litigants and buyers at judicial sales to have the proceedings by strict observance of law.

The record indicates that both Judge Dietz and Judge Davis were apprised of the issues. Judge Dietz' order of

May 9, 2002 "Denying defendant's motion to vacate interlocutory default, allow answer, counterclaims and cross claim is based specifically upon *Craddock v Sunshine Bus Lines, Inc.*, 133 S.W.2nd, 124 (Tex. 1939). (CR, 1st Supp. p. 34, par.2). He simply ignores the issues of jurisdiction and validly of the interlocutory default upon which his and all future orders in the case would be based. The same is true for Judge Davis in his order overruling Rosemary's motion to reconsider orders of 5/9/02.

A, or possibly the, most important by-product of the lacks in the record unsupportive of the interlocutory default judgment is that it chills and stifles bidding in a judicial sale. Receiver Grigson, on July 17, 2002 states that (Report, p.33, lines 5 ff.):

> "But if it's sold by a realtor, then a title company will be given the situation to look at. They'll analyze it and determine some of the things she's got a concern about; whether there are any exceptions to the title, whether there are any problems with the deed. And at that point the buyer and the seller will have a sale. We'll bring it to the Court. We'll put a record in the court – make a record, have testimony, and therefore it would be something – some of the things she's concerned that aren't in the record would be put in the record prior to the sale being confirmed by the Court."

But all of the things of concern to buyers or the court must be in the record prior to even marketing the property. Knowledgeable buyers at any judicial sale are going to look into the file. In the situation of a default, jurisdiction is going to be the number one factor. Knowledgeable buyers will simply steer clear of this property. Receiver

Grigson's above statement is fairly eloquent as to the "ripeness" of the case.

Also, the "indivisibility" of this property, or its relative value of the parts to the whole alleged by plaintiff is not in conformity to the evidence which Rosemary put into the file as an attachment to her answer on May 14, (CR, pp. 27 & 28). This was available to Judge Davis, but it is also available to any knowledgeable buyer, especially one who knows the area and knows that virtually all parcels nearby are far smaller than even the 13.885 acres divided three ways. The fact that the City of Austin requires no subdivision requirements for partition in kind further enhances the value of separate parcels over the whole.

In other words, *Robertson v Robertson* makes special requirements for valid sale of property in partition actions. The fact that there was a default does not obviate all the operative laws. If plaintiff had put into the file one single piece of substantiating evidence for indivisivility [sic], the law might have been fulfilled. But he did not.

* * *